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ABSTRACT

The document records testimony presented at a hearing on the Handicapped Children's Protection Act of 1985, which gives federal judges discretion to award to prevailing parents reasonable attorneys' fees associated with bringing their case to court. Prepared statements are presented from officials representing the American Association on Mental Deficiency, Consortium for Citizens with Developmental Disabilities, Council for Exceptional Children, Wisconsin Coalition for Advocacy, American Civil Liberties Union, Human Resources Center, and Florida Protection and Advocacy Agency. Statements of attorneys, parents, and senators are also presented. It is explained that the bill is a response to the U.S. Supreme Court's 1984 decision in Smith v. Robinson which ruled that P.L. 94-142 does not allow the award of attorneys' fees to parents who, after exhausting all available administrative procedures, prevail in a civil court action to protect their child's right to a free and appropriate education. (CL)

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S. HRG. 99-78

HANDICAPPED CHILDREN'S PROTECTION ACT OF 1985

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HEARING

BEFORE THE

SUBCOMMITTEE ON THE HANDICAPPED

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 415

TO AMEND THE EDUCATION OF THE HANDICAPPED ACT TO AUTHORIZE THE AWARD OF REASONABLE ATTORNEYS' FEES TO CERTAIN PREVAILING PARTIES, AND TO CLARIFY THE EFFECT OF THE EDUCATION OF THE HANDICAPPED ACT ON RIGHTS, PROCEDURES, AND REMEDIES UNDER OTHER LAWS RELATING TO THE PROHIBITION OF DISCRIMINATION

MAY 16, 1985

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CONTENTS

STATEMENTS

THURSDAY, MAY 16, 1985

	Page
American Association on Mental Deficiency, prepared statement	86
Consortium for Citizens With Developmental Disabilities, prepared statement	49
Council for Exceptional Children, the, prepared statement	82
Dussault, William L.E., attorney, Seattle, WA, prepared statement	15
Franz, John, staff attorney, Wisconsin Coalition for Advocacy, prepared statement	89
Larson, Richard E., attorney, Civil Liberties Union, New York, NY, prepared statement	40
Additional statement	106
Martin, Edwin W., president, Human Resources Center, Albertson, NY, and E. Richard Larson, attorney, Civil Liberties Union, New York, NY	31
National School Boards Association, prepared statement	61
Rossman, Jonathan P., executive director, Florida Protection and Advocacy Agency, prepared statement	92
Simon, Hon. Paul, a U.S. Senator from the State of Illinois, prepared statement	4
Tatro, Mary L., parent, Irving, TX; Edward Abrahamson, parent, Sharon, MA; and William L.E. Dussault, attorney, Seattle, WA	6

ADDITIONAL MATERIAL

Questions and answers:	
Responses of Mary Tatro to questions submitted by Senator Nickles	95
Responses of Mary Tatro to questions submitted by Senator Stafford	97
Responses of Mr. Martin to questions submitted by Senator Kerry	98
Responses of Mr. Martin to questions submitted by Senator Stafford	99
Responses of Mr. Abrahamson to questions submitted by Senator Stafford	100
Responses of Mr. Abrahamson to questions submitted by Senator Nickles	101
Responses of Mr. Dussault to questions submitted by Senator Nickles	103
Responses of Mr. Dussault to questions submitted by Senator Stafford	105

HANDICAPPED CHILDREN'S PROTECTION ACT OF 1985

THURSDAY, MAY 16, 1985

U.S. SENATE,
SUBCOMMITTEE ON THE HANDICAPPED,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to call, at 9:45 a.m., in room 430 of the Dirksen Senate Office Building, Senator Lowell P. Weicker, Jr. (chairman of the subcommittee) presiding.

Present: Senators Weicker, Stafford, Nickles, Thurmond, Kerry, and Simon.

OPENING STATEMENT OF SENATOR WEICKER

Senator WEICKER. This hearing of the Senate Subcommittee on the Handicapped of the Labor and Human Resources Committee will come to order.

The hearing has been convened to hear testimony concerning the Handicapped Children's Protection Act of 1985, which is a direct response to the *Smith* v. *Robinson* Supreme Court decision handed down on July 5, 1984. The decision has jeopardized the protection and enforcement of the educational rights of handicapped children. The Court ruled that the Education of the Handicapped Act, Public Law 94-142, does not allow the award of attorneys' fees to parents, who, after exhausting all available administrative procedures, prevail in a civil court action to protect their child's right to a free and appropriate education.

In their dissenting opinion to the *Smith* v. *Robinson* decision, Justices Brennan, Marshall, and Stevens prophetically observed that, "Congress will now have to take time to revisit the matter and until it does, the handicapped children of our country whose difficulties are compounded by discrimination and by other deprivations of constitutional rights, will have to pay the costs."

Today we are accepting that invitation to revisit the matter. It is clear to me that Justices Brennan, Marshall, and Stevens were correct; handicapped children are, indeed, paying the cost of the Court's misinterpretation of congressional intent. Unfortunately, they and their parents will continue to pay the cost until the Handicapped Childrens' Protection Act becomes law.

In addition to being an incorrect interpretation of congressional intent, *Smith* v. *Robinson* is already having serious negative consequences for handicapped children. Enforcement of Public Law 94-142 depends largely on the individual initiative of parents who be-

lieve that their rights have been denied. Without any hope of recovering attorney's fees, even when they are absolutely right, most parents can no longer afford to pursue their rights in Federal Court.

The bill that we are considering today is intended to be a simple restoration and clarification of congressional intent in enacting Public Law 94-142. In accomplishing that task, S. 415 addresses three straightforward issues.

First, Federal judges will have the discretion to award to prevailing parents reasonable attorney's fees associated with bringing their case to court.

Second, nothing in Public Law 94-142 shall be construed to restrict or limit the rights, procedures, and remedies available to the parents of handicapped children under the Constitution, section 504, or other Federal statutes prohibiting discrimination.

Third, the provisions of the amendment will be retroactive to include any actions or proceedings brought prior to, or pending at, the time of the *Smith* v. *Robinson* decision.

Although simple in its language and intent, the provisions of S. 415 are essential in insuring that handicapped children receive what is guaranteed to them by law. Congress intended that the promises of Public Law 94-142 would be held out to all—not just the wealthy. The victory for the Nation's handicapped and their families embodied in Public Law 94-142 would be hollow indeed, if its enforcement remains tied to an ability to pay.

Before starting, I would like to express my appreciation to Janet Bailey, of SL Association Inc., who is providing the interpreting services for the deaf.

Now, we will hear from Senator Kerry, Senator Stafford, and Senator Simon.

Senator Kerry.

Senator KERRY. Thank you, Mr. Chairman.

I am delighted to join with you and my colleagues here today to participate in this important hearing on S. 415, the Handicapped Childrens' Protection Act. I want to commend Senator Weicker for introducing this important piece of legislation which is designed to enhance the laws governing all handicapped childrens' rights to free and appropriate public education.

It saddens me, and I am sure that my colleagues join me in the feeling, that we must be here today to redress this imbalance. Over the last year, as Senator Weicker has stated in his opening comments, the Supreme Court ruled in *Smith* v. *Robinson* that most cases concerning the free and appropriate education of handicapped children must be settled exclusively under Public Law 94-142, the Education of Handicapped Act.

I think that is all of our belief that the Court's misinterpretation in this case, is discriminatory. Parents who prevail in court cases aimed at forcing school systems to live up to the law are currently not entitled to have those attorney's fees paid. In other words, families with moderate or low income are barred fundamentally from access to the courts and as a result, their right to due process and to a decent education for their children is limited.

As a freshman Senator to this subcommittee, I am obviously new to this process. I am new to the past intent of the Congress and the

laws that it has passed, but it is my understanding, as well as my belief, that neither Senator Stafford nor the other authors of Public Law 94-142 intended to limit handicapped children and their parents from access to due process. Nor did they intend the right to litigation be made available only to those who can afford it. As a former prosecutor, I am painfully aware of the financial and emotional burden that is placed upon individuals who are forced to pursue lengthy legal avenues, and who are even deterred from doing so as a consequence of their inability to be able to secure counsel.

Additionally, I would like to point out that virtually all of the existing civil rights laws in this country contain provisions for attorney's fees. I believe it is a fundamental guarantee of one's civil rights. I think the unnecessary hardship that is placed on families and the inequities resulting from *Smith* v. *Robinson* are in fact overwhelming and I look forward today to hearing the thoughts and the suggestions of our witnesses as they offer us their view of the importance of this legislation. Finally, I commend again, and recognize publicly, the important work that I think both Senator Stafford and Senator Weicker have offered on this subject, and thank them for their concern.

Thank you, very much, Mr. Chairman.

Senator WEICKER. Senator Kerry, thank you very much.

Senator Stafford.

Senator STAFFORD. Thank you, Mr. Chairman.

The Education of All Handicapped Children Act, Public Law 94-142, was enacted by the Congress in 1975, because we believed that disabled children were being excluded from public schools. This legislation mandated a free and appropriate education of all handicapped children and provided full due process protections under the law. In July of 1984, the Supreme Court issued a ruling in *Smith* v. *Robinson*, which has already been discussed by the chairman and by Senator Kerry and I will not repeat that portion of my statement, but I will say that when we originally drafted 94-142, we included prescriptive language concerning the administrative due process procedures that each State was to establish.

The purpose of these administrative hearings was to provide a vehicle to resolve disputes between parents and school districts outside the judicial system. In the vast majority of cases, this system has worked well. Very few cases have had to be resolved by the courts; fewer than one-hundredth of 1 percent. In virtually every other civil rights law, costs incurred by prevailing parties in court can be recovered if the judge chooses to make such a ruling, as Senator Kerry has pointed out.

Critics of S. 415 fear increased litigation as a consequence of making fees available to parents who are successful at the court level. It is my belief that the knowledge that fees can be awarded will encourage local and State education agencies to work out compromises with parents before court actions become necessary.

A law that mandates a free and appropriate education to handicapped children, that at the same time denies the awarding of legal fees incurred to uphold that mandate is a hollow promise at best and it hurts the families most, that can least afford it.

Parents must have every opportunity to participate with local school personnel to develop programs for their handicapped children if Public Law 94-142 is to work effectively. That includes having the prospect of financial reimbursement for legal fees if the services of an attorney are necessary to this process.

I hope that the Senate will act swiftly to amend the Education for All Handicapped Children Act, clarifying the congressional intent for the courts. And I, like Senator Kerry and others, salute our chairman, Senator Weicker, for his leadership on this important legislation.

And I also look forward to hearing the witnesses this morning.

Thank you, Mr. Chairman.

Senator WEICKER. Thank you, Senator Stafford.

We would not even be here, I might add, were it not for your having put together Public Law 94-142. So that is where the compliments belong.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

I want to join my colleagues in appreciation of your leadership on this, Senator Weicker. I want to put my full statement in the record, and I also join in appreciation for Senator Stafford's original leadership on Public 94-142. I was, as a freshman Member of the House, a cosponsor of this legislation. While there are a lot of things that I have done through the years that have received more publicity, I have to say that there is little that I have done for which I have received as much satisfaction as the creation of Public Law 94-142.

I think that one of the things that was clear in the minds of all of us when we created Public Law 94-142 was that the economic status of the parents should have nothing to do with whether or not a child received an opportunity for an appropriate public education. I think the *Smith* v. *Robinson* decision by the U.S. Supreme Court, brings that into question for a great many people. You are talking about parents who already have serious financial problems simply because their children are handicapped. And to compound this by saying that they are not eligible for attorney's fees simply compounds all the problems.

I would join in the point made by Senator Stafford that the decision is, in fact, going to cause more litigation. It is going to make some school boards reluctant to sit down and negotiate and work things out. I think the law before *Smith* v. *Robinson* —or the law as we intended it—was sound, and I hope we move back there quickly and get this bill out of the subcommittee and out of the full committee and through this Congress to the President very quickly.

Thank you, Mr. Chairman.

[The prepared statement of Senator Simon follows:]

PREPARED STATEMENT OF SENATOR SIMON

As one who cosponsored the original House version of the bill that became Public Law 94-142, I think that all of us who were involved in that process would have been surprised if we had known that we would be here today.

Nothing could have been clearer to us than the fact that we did not want a parent's economic status to be a factor in whether or not their child would be assured

of an appropriate public education. That would have turned upside down the whole purpose of our actions in passing this law.

But that turning upside down is, in effect, where this Supreme Court case, *Smith v. Robinson* puts us. The total lack of parents' ability be reimbursed for attorneys' fees means very few will have the resources to pursue their child's rights when it is necessary for them to do so.

It should be said, first of all, that we are talking about only a small percentage of the handicapped school population. The record of the last 10 years has been overall an encouraging one—showing the ability of schools to work with parents on behalf of these children. But there have been problems, and we can't ignore the fact that there continue to be some problems.

Ironically, instead of encouraging schools to work cooperatively with parents to meet the child's needs, the Supreme Court decision gives an incentive to schools not to compromise on solutions, but to delay action, to stretch out the administrative process and to force parents into court for relief, knowing that their ability to go to court is lessened without attorneys' fees.

Some fear that providing the possibility of attorneys' fees will increase the amount of litigation. I don't believe so. In the first place, attorneys' fees have been granted by some courts in the past. It has been an assumed possibility if the parents' case was successful. There is no indication that the possibility increased parents' interest in going to court. Under the bill we are considering, the attorney fees are still just a "possibility"—depending on the success of the parents' actions and on the discretion of a court.

Second, we know that parents of handicapped children have enormous financial and family burdens from the time the handicapped child is born. They probably have had to fight many battles on their child's behalf before he or she is even of school age. They are not interested in getting into battles with the school system that they are probably going to have to be dealing with for the next 12 or 13 years. They do not want to delay their child's education for 1 day, let alone the sometimes years it takes to pursue administrative and court remedies.

One other point is important. Some argue that the administrative hearings process should not be covered by this bill. Unfortunately the arguments on this ignore the fact that these hearings—where witnesses are called and sometimes technical and medical evidence is offered—are quasi-judicial, and certainly the schools have access to counsel for these hearings. It is simply an issue of fairness to ensure that parents may also have the advice of an attorney for these hearings. This does not affect the informal process in which parents meet with school officials to work out and IEP for their child. It would only be where the informeal process do not work to provide an appropriate education, and it is necessary for parents to move to the formal hearing level, that attorneys would become a possibility.

Mr. Chairman, I hope we can move quickly to the adoption of S. 415, which is one of the most important pieces of legislation affecting the lives of handicapped children in this country to be considered in the last 10 years.

Senator WEICKER. Thank you very much, Senator Simon.

Senator Nickles.

Senator NICKLES. I don't have an opening statement, Mr. Chairman, thank you.

Senator WEICKER. All right, the first panel consists of Mary Tatro of Irving, TX; Edward Abrahamson from Sharon, MA; and William Dussault of Seattle, WA.

Please have a seat and make yourselves comfortable. Why don't we proceed in the same order. Mary, why don't you lead off. We are looking forward to the testimony from all of you, and I am sure the panel will have a few questions to ask after you are through.

I think that it might be best, No. 1, to assure all three of you that your statements in their entirety will be placed in the record; and, No. 2, we will hear from all the panel before the questioning commences.

STATEMENTS OF MARY L. TATRO, PARENT, IRVING, TX; EDWARD ABRAHAMSON, PARENT, SHARON, MA; AND WILLIAM L.E. DUSSAULT, ATTORNEY, SEATTLE, WA

Mrs. TATRO. Thank you very much for this opportunity to appear before this committee. My name is Mary Tatro, and I am the parent of a 9-year-old young lady named Amber, who was born with a congenital birth defect known as spina bifida, which means an open spine. We live in Irving, TX. Due to Amber's birth defect, like 98 percent of all children born with spina bifida, she developed hydrocephalus or water on the brain. She has partial paralysis of her lower extremities, and walks with braces and crutches. Because of this paralysis she has poor bowel and bladder control. She has had many surgeries in her young life; among these were surgeries to close her back, installation of a shunt into her brain to relieve the hydrocephalus, two eye operations, two hip surgeries, and repair of a tethered spinal cord.

Amber is truly an ideal Public Law 94-142 child. She functions well in the "normal" classroom with her "normal" peers. She receives occupational and physical therapy, adaptive PE and is resourced for 1 hour each day—45 minutes for math and 15 minutes for handwriting. She has just received her report card, and her lowest grade was a B minus.

The bladder problem was the kicker when it came time to enroll Amber in the Irving Independent School District's early childhood program, thus beginning 5 years and 2 months of pure hell for the Tatro family. Because of the paralyzed muscles to her bladder, Amber has had many, many bladder infections until a fairly new procedure was prescribed called clean intermittent catheterization or CIC. This is a very simple method of draining the bladder and it can be done by any lay person after a minimal amount of training. Most of the children can be trained to eventually do CIC for themselves. This method keeps the urine from refluxing back into her kidneys.

In 1978, I contacted the school district and informed them of Amber and her condition, including the fact that she must have CIC during the school day in order to try to keep the bladder and kidneys intact without further damage. In 1979 she was tested by the school and our IEP meeting was held. I had been informed by the school that even though Public Law 94-142 states that disabled children are eligible from age 3 through 5 for the program, the State of Texas does not allow disabled children to start to the early childhood program unless the child is 3 by September 1.

Amber's birthday falls on October 9, so that right there she had to wait almost 1 full year before we could try to enroll her in the program. She had been in a school for disabled children paid for at our expense since she was a year old. There was no program for her at that school after age 3, because all of the children that she was in class with at that school started to the Irving Early Childhood Program. Amber did not get to start to school at that time, and this is the way that the legal battle went.

In 1979, testing was done by the school district and Amber qualified for the program. The IEP meeting, which is called an ARD in Texas, was held and CIC was refused. I had prepared by taking doc-

umentation from the Office of Civil Rights in Kansas City, MO, in regard to CIC as there had been a case there.

I investigated and advised the school that several schools in the area already provided CIC, among those were Dallas, Fort Worth, Garland, and Terrell. We appealed. Due process hearing was held and we won. We filed civil rights complaint with HEW in Dallas. The Commissioner of Education upheld the hearing officer. Irving appealed. Irving appealed to the Texas State Board of Education who illegally overturned the hearing officer's decision.

We asked for an appeal and were turned down after being informed that there was no provision under Texas regulations for an appeal before the board. We filed in the U.S. district court in Dallas. The judge ruled against our request for an injunction putting Amber into school and in fact more or less dismissed our case.

In 1980 we appealed to the Fifth Circuit Court and were heard in June. The case was remanded with instructions, including the fact that CIC was a related service. Irving appealed to the Fifth Circuit Court for a rehearing, which was denied.

In 1981 we finally had our day in court in January. After hearing the case, the judge issued an order to provide CIC while making the final judgment. Amber started to school after the school gave us the runaround the whole first day.

We went back to court for a contempt motion against the Irving School District. Irving had stopped doing CIC. The judge again ordered the school to provide CIC. They did from April through May.

In 1981 we had another ARD to outline Amber's IEP for the coming year, including our giving the district new medical forms and prescriptions. The first day of school I was called at my office in Dallas and advised that the school would not provide CIC for Amber, which was due in 30 minutes, the reason for this being that we lived close to the school so that the superintendent said that they were not going to provide CIC. One week later Amber entered the hospital for surgery. I had to ask my friend to provide the CIC when the school refused again. How could I ask this child, who loved school so much, to stay out of school again because of her bladder?

She had already lost time, and wanted to know then why she could not go to school with the other children when we would drive by the school. I told her that the judge had to say that she could go. The first thing that she asked when we went to court was, did the judge say that I could go to school? I did not tell this little 3-year-old that the school officials just did not want her in school, but they proved that many times over.

In 1982 back to court for a contempt motion against the school. Irving was ordered to provide CIC again. The school appealed back to the judge and then to the fifth circuit again.

In the fall of 1983, we had our second hearing before the fifth circuit court. Again we won. Again Irving appealed. Irving then appealed to the Supreme Court. And in 1984, on April 13, 1984, our case was heard in the Supreme Court and on July 5, 1984, in a 9 to 0 decision, Amber won her right to go to school with the supportive service of CIC.

However, because of *Smith* v. *Robinson*, our attorney fees were denied, even though we had filed separately from the case a 504 complaint with HEW.

I would like to say something at this point about the Department of Education Office of Civil Rights. The people in Dallas did a super job, they made their finding and tried to work with the school. I do not believe that the school ever answered the complaint. The case was referred by the Dallas Office to Washington, asking the Department of Education to have the Justice Department to enter the case.

They refused. However, when the Supreme Court decided to hear the case, the Department of Education in Washington wanted to enter as a friend of the court for the school district. The Justice Department wanted to enter on Amber's behalf, so that no one was allowed to enter a brief.

The Dallas Office was flabbergasted. After all of their efforts and recommendations to have Washington do right the opposite of what Dallas recommended. You can understand if I tell you that I was a lot more than upset.

Our legal costs for the due process hearing, which we won, were less than $1,000. Unfortunately, the school district contested the hearing officer's decision, causing a long and unnecessary and very expensive legal battle.

The cost of our legal fees to finally win our case at the Supreme Court was almost $200,000. Luckily, after the fifth circuit hearing, we were able to get help from Advocacy, Inc., in Austin, TX, or we would have been financially unable to continue to fight for our daughter's rights.

Because they insisted on fighting the original hearing officer's decision and all subsequent decisions in our favor, the school district also spent over $200,000 unnecessarily which could have been used to improve educational programs.

One of the Irving School Board members reportedly told the press that the district had really won the Supreme Court case because they did not have to pay our attorney fees.

School districts, especially in Texas, will go to the ends of the earth to fight parents of disabled children. They know that most parents are already tired from just the care that it takes for a disabled child. Some parents have moved from districts such as Irving rather than try to fight the system. We parents do not have the money to fight the school districts. We are already strapped with high medical costs for our disabled children, not to mention braces and wheelchairs and the like.

If school board members had to pay these legal fees out of their own pockets, instead of using the taxpayers money, it would be a different ball game.

Schools have the attitude that they will not, under any circumstances, give an inch. Not even when they know that the parent is right. They will fight to the bitter end to see that disabled children are forced to accept just anything that they may want to offer. And in our case, they offered no alternative program at all.

It is my belief that the Irving District felt that they would win our case, not on the merits of the case, but on the belief that we probably did not have the money to fight a big school district like

Irving. Besides that, they felt that we would not have the stamina or energy to fight the harassment and still continue the legal battles. Irving was wrong this time. We were very fortunate to find the resource of Advocacy to continue for us after we had already run up a large legal bill. The harassment the school district put my family through would finish people, but from somewhere we found the energy to continue. We knew that once we began this battle if we had to give up, then not only did our Amber lose, but every disabled child in the United States would lose.

We parents have already had to fight to keep Public Law 94-142 when the Department of Education tried to change the regulations enough to gut the law. This would surely have put these disabled children back in the closet with disabled children who in the past years were denied any type of education.

Our disabled children deserve a chance. Surely, if our country can take care of the other countries of the world, we can surely see to it that our disabled children are afforded equal opportunity under the laws of our land. Without the parents being able to recover attorney's fees, Public Law 94-142 is again gutted. School districts want to put a stop to these children having any rights.

Is there really any justice for all? Not without your help, there is not. These kids are super kids and they surely deserve the same chance that nondisabled children have, the right to an education. Believe me, they would not be able to receive the rights unless the law is amended to include the awarding of attorney fees to the prevailing parents or guardians of disabled children.

Thank you again for your work on this committee. We parents appreciate your work, not only for our children, but for all of those with a disability.

I thank you for your time and this opportunity to appear before you.

Senator WEICKER. Mary, thank you for a very, very eloquent testimony.

We will get to the questions later.

Edward Abrahamson, it is very nice to have you here for these proceedings.

Mr. ABRAHAMSON. Honorable chairman and members of the committee, I am Edward Abrahamson of Sharon, MA, and since my wife Janet is unable to be here today, I will tell you our story about what parents or guardians of a handicapped child must endure in order to defend the right of their children to an appropriate education.

There is a civil war of sorts raging in the countryside. As you hear the names of just a very few of its notable battles; *Kruell* v. *Biggs and New Castle County, North* v. *District of Columbia, Smith* v. *Robinson, Tatro* v. *Texas, Abrahamson* v. *Sharon School Committee and the Commonwealth of Massachusetts,* listen also to the plaintiff musketry of the parents, those folks named before the "versus", followed by the thunder of the defendants' heavy guns, those folks named after the "versus".

How is that our Congress' noble and precious education for All Handicapped Children's Act born of the will of the people, sends our lightly equipped infantry parents against the cannonaded positions of ensconced establishment?

After the debacle of *Smith* v. *Robinson,* we turned to you for just a bit more dry powder so that we may sustain our seemingly endless battles. My son Danny's story began 11 months after birth in 1966.

One of three children, he was diagnosed developmentally retarded, a great shock to parents who typically, I am sure, never expected anything to go wrong. Danny is multiply handicapped, with a kidney disorder and neuromuscular seizures. He is severely retarded with autistic-like behavior and has no verbal communication.

The first dragon facing parents of handicapped children is the piecing together and maintaining of the proper medical support structure. This is, in itself, an expensive time and energy consuming endeavor, which in our case involved the mental health establishment.

The second dragon intimidating the parents of the handicapped child is the educational establishment. Some people of this establishment, perceiving perhaps more obligation to administrate than to educate, are busy balancing school budgets, never mind the lofty intent and the wording of a right-to-education statute. So that when a parent petitions his school district for a program appropriate to his child's individual needs, per the statute, he is very often offered a totally inadequate response.

Danny's "formal" education began in 1969 at a preschool day program. It suddenly became clear that he was intractable both at school and at home. And in 1975 he was placed in an austere residential program which could not handle his 12 to 20 daily attempts to escape. He was eventually placed in a more capable and costly year-round residential program despite tenacious resistance by our town's school superintendent.

In 1979 the school authorities precipitously decided to ship him back to a 10-month public school program. Since the program changes offered were, from past experience, totally inadequate we were forced to reject the education plan, and were thereby plunged into the full administrative appeals process. This required us to hire an attorney and expert witnesses to defend our position in the hearings requested by the school officials, who were represented by legal counsel.

We were now face to face with our third dragon: The legal industry surrounding our judiciary. The wheels of justice grind exceedingly fine and slow, and expensive. By the time our April 1980 State administrative hearing was lost, and then our October 1980 State administrative appeal was lost, we were out of pocket and low in spirits.

Nevertheless, we filed suit in Federal district court in January 1981 against the School Committee and the Commonwealth of Massachusetts but had to hurdle sundry expensive maneuvers and injunctions to ensure that the town continued Danny's education while the appeals proceeded.

In a February 1981 hearing, the Federal judge remanded the case back to the State's administrative hearing officer for reconsideration in light of new evidence.

In June 1981, we lost the remand decision by the State administrative hearing officer, who reaffirmed his original order.

In July 1981, the Federal court took additional evidence from expert witnesses. In January 1982, the court agreed with us that a free and appropriate education for Danny includes a residential program because it is essential to his learning of communication and self-help skills. One of several ironies in this case was that it took a Federal judge to use a Federal statute in order to enforce a State law, Massachusetts Chapter 766, upon which our precious Federal law was modeled.

Our relief was short-lived however, upon notification that the town had appealed the case to the U.S. First Circuit Court of Appeals. By this time, expenses for legal services, expert witnesses, court costs, and transcribing days of testimony was into five figures. We then learned that it would cost us at least an additional $5,000 just to continue. It was timed perfectly, just when I lost my job. Were it not for the prompt support of the nonprofit Massachusetts Advocacy Center—whose attorney on the case is with us today, sitting behind us—and other organizations, who became amici curiae in the first circuit of appeal, we might not have eventually prevailed in 1983, because we had been ground down to our knees although I believe that we never let it show. The fact that we again prevailed, however, still did not entitle us to reimbursement for our considerable expenditure on attorneys and expert witnesses.

It is also quite clear that it is not possible to even go through even the administrative hearings without competent legal representation and expert testimony. This would risk jeopardizing an entire case at its inception because the careful preparation of evidence and questioning of the witnesses is essential.

Most of this happens at the quasi-judicial administrative hearing. Therefore, we urge that Congress expressly authorize administrative hearing officers as well as courts to award to parents who prevail, reimbursement for their considerable expenses incurred in both administrative and judicial proceedings. Authority to reimburse for the administrative hearings should also be given to the administrative hearing officers because the parties should be discouraged from appealing to the courts unless absolutely necessary.

Thank you.

Senator WEICKER. Thank you very much, Ed.

William Dussault.

Mr. DUSSAULT. Thank you, Mr. Chairman, and members of the panel.

My name is William Dussault and I am an attorney in private practice from Seattle, WA. Having submitted my written testimony in advance, I am going to depart from reading it just slightly and give you some personal perspectives on this issue that perhaps might be illuminating.

I have had the opportunity to represent parents like the ones who are on the panel today, for almost 15 years in special education litigation. In the State of Washington, we were fortunate to pass a law requiring due process proceedings in special education as early as 1970. In that context, I have represented many hundreds of parents at the negotiation stage, the administration stage, and subsequently in litigation.

It is my strong belief that when both our State law was passed and our Federal law was passed there was a presumption that the parties would have a certain equality; that there would be respect between the parties. The school district would respect the parents for their knowledge of their particular children and that the parents, in turn, would respect the school districts for their knowledge of education of handicapped children in general.

It is my experience in literally hundreds of negotiation cases that the anticipated respect has, in fact, been granted between the parties and that there are only a small number of cases where, for whatever reason, a dispute arises. I have represented parents with all kinds of socioeconomic backgrounds; all kinds of questions and having children with all types of disabilities, from the mild disabilities to the very severe.

Some of the parents have strong feelings and some are only mildly involved. But we place them all within an administrative hearing process where the premium appears to be on winning. It is almost like the Vince Lombardi school of litigation; the contest becomes everything, not the outcome for the child. We have lost sight of the fact that what is really at risk here is the child.

In the early years of the due process hearings that went on in the States, the primary focus was the child. We focused on trying to obtain the appropriate individualized program for the child. It was my experience that school districts "lost"—I use that term in a very limited context—more cases than they won. They became aware that their traditional autonomy and position of authority was being eroded by a new concept in education.

Clearly 94-142 signaled a revolutionary new concept in education, giving parents an equal and a substantial right to determine programs with the school districts. And that is unique in education today.

The hearings started to become more and more formalized. School districts used in-house counsel, hired expensive out-of-house counsel, sometimes used county prosecutors, sometimes used State attorney generals. Counsel was always available to the school districts. Counsel was not similarly available to the parents.

I think it is very, very important to remember some facts when we hear criticisms that S. 415 will trigger a flood of new litigation, with aggressive attorneys bringing suits solely for the purpose of achieving attorneys' fees. Awards of attorneys' fees were available to some degree prior to *Smith*. We saw a split in the circuit courts in the United States with some courts awarding attorneys' fees, culminating 94-142 causes of action with section 504 and section 1983 causes of action under civil rights laws. Even though attorneys' fees were awarded in some cases, prior to *Smith*, in fact, in the vast majority of litigation, the courts exercised their discretion and did not make such awards. Even when fees were considered by the courts, they were considered on the traditional bases used for evaluating such claims. It was not by any means an automatic award.

I think that you will find that, given the numbers of hours and effort put into such litigation, the attorneys were quite often eating a good deal of their hourly fees, if not a substantial portion of

them. The awards made by the court did not come close to compensating the attorneys involved for the time that they had put in.

A broad group of attorneys specializing in special education cases, if you will, a bar for the parents in bringing these cases, has simply not developed in the United States. There are less than 10 attorneys in the United States in private practice who do these kinds of cases on a regular basis. Special education law is complicated, and it is difficult and it is highly technical. It requires the assistance of expert witnesses that are also expensive.

It is only through the incredible efforts of parents, such as those here on the panel, that any of these cases come to court. I know of no case where the parent has been able to fully compensate the attorney for all the services rendered in these special education due-process appeals and the subsequent appeals. It simply has not happened.

I think that it is important as we look at the process to look at the balance of power between the two parties. The due-process procedures were meant to resolve possible negotiation impasses in the development of students' programs. Public Law 94-142 established a system where parents and school districts could come to the table to attempt to develop a program on an equal basis. When an impasse is reached in that process, the law allows a due-process proceeding. Any negotiation process—and you are aware of this in your work here in the Senate—nationally and internationally, depends upon both sides wanting something, and at the same time having something to lose.

If one side in the negotiation process is not at risk, has no jeopardy, then what incentive is there for that side to negotiate? We know that under the law the student is required to remain in the then-current placement during the entire pendency of the due process proceeding.

That is, of course, to the advantage of the school district, which has placed the child in that program prior to the negotiation. We know, from the recent Supreme Court *Burlington* decision, that if the parents remove the child from the then-current placement, they do so at their own financial risk, quoting from the Court's opinion. Thus, there is no incentive for the parent to drag this hearing out, to make it complicated and extended.

The advantage is to the school district, because the child remains in placement during that period of time, at the school district's advantage. There is no disadvantage to the school district as to attorneys' fees, at this point, because they have their in-house counsel or they have counsel provided through Government sources. Essentially the school district has no risk in the proceeding, and it is to their advantage to delay.

The parents on the other hand know that they have 12 to 14 years of public education provided at public expense for their child. The cases represented before you on this panel took 6 years and 4 years respectively out of a total educational program of 12 to 14 years. Was that to the child's advantage? Was that to the parent's advantage?

Clearly not. It is to the parents advantage to settle the case quickly and efficiently to negotiate at the earliest possible stage. That negotiation can only take place if both sides on the negotiat-

ing table understand that there is some potential jeopardy for them.

The recent Supreme Court *Burlington* decision, places the school district in some jeopardy; they now know that if their program is ultimately not to be appropriate, the district may bear some costs. S. 415, simply equalizes the position with regard to attorneys' fees. If the district fails to negotiate in good faith, the parents are going to have no option but to go to due process or to litigate. With both the *Burlington* ruling and S. 415, both parties are placed in an equal negotiating position.

This provides the necessary incentive to bring the parties to the table on an equal basis. Far from encouraging litigation, I would tend to agree with Senator Stafford that this law is going to remove the impetus for a litigation. It is going to remove the incentive of the school district to delay, to obfuscate. It is going to encourage them to come to the bargaining table in good faith, to avoid future costs. And in that respect, it is going to substantially bring us back to the implementation of the law as it was intended.

I support your efforts. I am honored to present to this panel, I am more honored frankly, to sit at the same table with the parents that have not been beaten down by the exhaustion imposed by school districts.

Thank you.

[The prepared statement of Mr. Dussault follows:]

TESTIMONY OF WILLIAM L. E. DUSSAULT REGARDING

SENATE BILL 415

THE HANDICAPPED CHILDREN'S PROTECTION ACT OF 1985

TO THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE, SUBCOMMITTEE OF THE HANDICAPPED OF THE LABOR AND HUMAN RESOURCES COMMITTEE

THE HONORABLE LOWELL P. WEICKER, JR., CHAIRMAN

TO: SENATOR WEICKER AND MEMBERS OF THE COMMITTEE

As an attorney in private practice since 1970, I have had the opportunity to represent many hundreds of parents and their handicapped children in attempts to obtain both the substantive and procedural rights to which they are entitled under both State and Federal law. I have also represented and consulted with local and state educational agencies and national organizations such as National Society for Children and Adults with Autism (NSAC) and the Association for the Severely Handicapped (TASH).

Working with parents, I drafted the 1970 Washington State "Education For All Handicapped Children Act" which was one of the first State laws to require individualized appropriate educational opportunities for all handicapped children within the State. The law was conceived and drafted as a civil rights law to protect the rights of handicapped children to a free and appropriate public education.

In order to correct the obvious inequities that existed in public education for children with disabilities, it was necessary to include withinthe law, due process protections that gave parents the right and ability to challenge school district decisions which either excluded or inappropriately placed handicapped

children.

Subsequent to the passage and implementation of our State mandatory education law, Public Law 94-142 was enacted by Congress, based in large part upon two pieces of civil rights litigation, The Pennsylvania Association for Retarded Citizens v. The State of Pennsylvania and Mills v. The Washington, D.C. Board of Education. As the prologue (Section 601) to Public Law 94-142 demonstrates, the principal intent behind the law was to secure rights to free and appropriate public education for handicapped children who had previously been denied those rights.

One of the key elements that made Public Law 94-142 unique in the context of education and civil rights legislation was the inclusion of specific procedural rights granted to the parents of handicapped children when substantive conflicts arose between the parents and the school districts. The due process protections were an attempt to mitigate the position of total authority and dominance previously adopted by school personnel. The law emphasizes equality for both parties in the planning process, with each respected as having expertise in their respective areas: school districts, in the technical aspects of education of handicapped children in general; and parents, in the highly specialized and diverse needs of their individual children. The educational program for each child was required to be individually designed for each child's specific needs and a program that was "appropriate" for that child was to be established.

The term "appropriate" was not substantively defined in the legislation. Subsequent litigation, even including a case before

the United States Supreme Court (Rowley v. Hendrick Hudson Board of Education), has not resulted in a substantive definition of the word. For the most part, we are left with the concept that an "appropriate" program is to come out of negotiation and discussion between the school district and the parents with both parties participating and respecting the other on an equal basis. Legislative history acknowledges Congress' belief that both sides of this process would act in good faith, truly desiring to obtain a result in the best interests and for the benefit of the handicapped child. My experience in special education matters and the statistics presented by the Office of Special Education and Rehabilitation Services of the Department of Education in their Annual Report to Congress demonstrate that in the vast majority of special education matters, such good faith negotiation and program development has occurred.

However, even within a good faith negotiation process, and certainly when bad faith is demonstrated, the parties may be unable to reach agreement. It was expressly in anticipation of such possible disagreement on program or placement elements that the due process protections of the Act were established. The presumption of equality for both parties was to apply in both the program development negotiation and the due process procedure. The Smith decision has significantly and negatively impacted the "equality" in the due process procedures.

It is my strong belief, supported by the Congressional history, that Congress intended the due process procedures provided in and pursuant to the Act to be a cooperative dispute resolution process that would not involve expensive, extended,

time consuming professional adversarial relationships. In the first years of implementation of the Act, the Congressional intent was generally met. If attorneys appeared in the proceedings at all, representation was low key with the primary focus being resolution of the disagreement in the least expensive, least time consuming way. Attorneys often acted as facilitators for both sides in the dispute to aid the parties in understanding their rights under the law and reaching an amicable resolution to any conflict regarding the child's program.

Gradually, as school districts began to feel a loss of their traditional autonomy, their attorneys began to take a more formal, adversarial position. Hearings became more rigid. What was intended to be a quick and highly efficient means of resolving disputes often turned into extended litigation. It was not unusual for such cases to take years to come to conclusion.

School districts have the inherent advantage in such a circumstance. Most school districts have access to legal counsel through several means. The larger school districts often have counsel on their staff or hire independent outside counsel on a regular basis. Many local education agencies have access to city or county corporation counsel or district attorneys. State education associations virtually all have access to the state attorney general.

The parents, on the other hand, did not have access to such publicly paid, highly trained legal advisors. In order to obtain advice on their rights and representation in the hearings, the parents had to obtain private counsel. Few, if any, publicly

supported legal services corporations included representation in special education among the services offered. Thus, only those parents who were able to afford the private attorneys' fees or who were able to obtain pro bono assistance were able to vitiate the rights of their children in the special education due process procedures.

By 1980, it was not unusual for contested special education cases to take six months to a year to come to their initial hearing. The procedures allowed for a review hearing at the state level, transfer to state or federal trial courts, and consequent appeals. It made little difference whether the dispute between the parent and the school district was one based on good faith or one based on either parties' stubbornness or refusal to consider the position of the other. Because of the school districts' inherent advantage in having public funds available to pay for counsel, the initial goal of Congress of equalizing the relationship between the parents and the school districts no longer applied. Only those parents with exceptional endurance and resources were able to stay the course and complete the challenge to the program.

Prior to the Supreme Court decision in Smith v. Robinson, parents who successfully challenged the school districts' proposals were sometimes successful in combining the various other civil rights protections established by Congress (Section 1983 and Section 504) and obtaining court awarded reasonable attorneys' fees. The courts considered the respective positions of the parties, reviewed the equities, and approved attorneys' fees as the courts deemed appropriate as is traditional in civil

rights litigation. It is important to note that the fact that attorneys' fees were occasionally available and awarded did not spark a "flood" of special education litigation across the country. Far from being a flood, special education litigation has been merely a trickle.

The law contains numerous disincentives to pursuing litigation. It establishes a requirement that the child will stay in the "then current" placement during the pendency of the review procedures. A recent Supreme Court decision in Town of Burlington illustrates that any parent who unilaterally withdraws a child during the pendency of the procedures and subsequently places the child in a private program does so at the parents' own financial risk. Thus it is clear that it is in the parents' best interest to reach the speediest possible resolution of any contested issue in the child's educational program. The advantage of delay and procrastination in the hearing process rests solely with the school district.

A cadre of private attorneys specializing in special education litigation have begun making their services available to defend school districts. The school districts' ability to pay attorneys' fees on a regular basis encourages development of the private bar. Parents in special education proceedings, however, have not been able to generate similar interest by private attorneys due to lack of sufficient and regular funding. Given the fact of ready and regular sources of funding and the inherent advantage to school districts in delaying and obfuscating the hearings, Congress' initial intent to equalize the positions of

the participants in the due process procedure have been completely obviated.

Since the Smith v. Robinson decisions, I have met with many parents of handicapped children who express valid challenges to the school districts' proposed program for their children. Issues involving the appropriateness of placement, the need for related services, the identification of their childrens' special education needs, have all been brought for review. Parents often have some familiarity with special education laws and expect assistance through the due process procedures and subsequent appeals to obtain a quick resolution of the issue on behalf of their children. They are all faced with the pressure of time as they readily acknowledge that their children have only a limited number of years available in public education. I am now forced to candidly advise them that, even if they challenge the school districts' position through the due process procedures on their own, they are likely to face a highly skilled attorney as their opposition. If the parents are represented, the school district's attorney will, in all likelihood, utilize the time consuming and costly procedures available through various administrative procedure acts, through court rules in extensive discovery procedures, increasingly rigorous and legalistic due process hearings, and in the drafting and presentation of extensive legal briefs. In order to succeed in the due process procedures, the parents are going to have to respond in kind, despite the fact that the basic and underlying issue might be relatively simple and straightforward.

Five years ago, the cost to parents to obtain representation

in special education hearings might have averaged a total of $500 to $750 for a case. It was likely that the conflict could be resolved through effective negotiation prior to a hearing. If a hearing was necessary, there was some possibility of obtaining reimbursement of all or a portion of their attorneys' fees. Parents are now advised that in the event an appropriate settlement of their dispute is negotiated with the school district, the negotiation itself may cost $1,000 to $1,500, with no chance whatsoever of recovering that sum. Should full litigation be necessary, the cost may well reach $15,000 to $20,000 through the initial hearing and initial appeal to the State or Federal trial court. As a result of the Smith case, there is no fee recovery even if parents are found to be correct in their position regarding the child's program. For all of the parents who have brought cases to me subsequent to the Smith decision, this advice has had a "chilling" effect, causing frustration and anguish. All have been discouraged from following through with the procedures notwithstanding the fact that they may have had a very valid substantive claim.

The lack of availability of attorneys' fees in both the administrative and any subsequent court proceedings has resulted in such an inequality of positions between the parents and the school districts, as to make a mockery of the due process procedures set forth in the Act and regulations. The only way to bring this situation back into balance is to reinstitute the situation that pertained prior to the Smith decision. Parents should be allowed to present to the court justifications for an

award of attorneys' fees in both administrative and judicial proceedings subject to the courts' review, discretion and approval.

S. 415, in a simple, clear-cut and completely understandable piece of legislation, provides the appropriate redress to ensure the equality of both parties to mitigate the inherent advantage to school districts of procrastination through legal devices. It re-establishes Congressional intent to resolve disputes in a speedy and efficient process. If the promise of Public Law 94-142 to parents is to be realized, they must have a meaningful opportunity to actively participate in the development of their child's program. The expertise offered by the parents can only be effectively injected into the planning procedure when the school district perceives that it is at some financial jeopardy if it refuses to negotiate with the parents on an equal basis and in good faith. To protect the original civil rights focus of this most meaningful piece of legislation, Senate 415 is thus dramatically required.

WLED:rmf

Senator WEICKER. Senator Stafford has another committee meeting that he has to attend but he will be submitting questions for the record.

And I agree with you, Counsel, that people like Mary and Ed are to be complimented for waging a fight, clearly not just for their own children, but for the principles that apply to thousands of other children.

Mary, I understand that the school system was repeatedly ordered by both the hearing officer and the courts to provide catheterization for your daughter, Amber.

How did the school system respond to these orders?

Mrs. TATRO. We had a court order from the judge in Dallas, to get her into school and to do the catheterization. Twice they stopped. They kept saying, well, you did not give us the proper medical forms. I kept sending forms and returning them. They were medical forms provided to me by the school district. Everytime they would find something wrong with it, whether it was a period in the wrong place or whatever.

So one day they just called my attorney and said, "We are not doing the catheterization", and they stopped. It took us months, and months, and months to get back into the courthouse. My friend went to the school and did the catheterization for me, because I work in Dallas and there is no way that I could go from Dallas to Irving to do it.

Senator WEICKER. How long did it take from the time that catheterization was ordered by the hearing officer until it was consistently provided for your daughter?

Mrs. TATRO. You know, we finally got her in school the latter part of the second year that she should have been there. They provided CIC for a couple of months and then we started back in school in September, and that day they called and said that they were not doing catheterization that year, even though we had already given them the new medical forms that they wanted, because we lived close to the school.

But then she went to the hospital and it was some 4 months before we finally got back in school. At the ARD meeting to get her back from homebound into the school system I took a copy of the court order from the judge and a copy of the judgment and I passed it out to all the committee and we were again denied catheterization, even with a court order. The school district brought in doctors from the community, I suppose to overturn my doctor's decision, but they refused to do that. They did state that the prescription was valid and that is what the order said, with a valid medical prescription, they were to provide catheterization.

It took some 3 more months to get back into the courthouse and this time, he says, I do not want you to stop, more or less. The judge was really aware at that time that they were not being very reasonable. It seems that everything that we were doing was being harassed, you know, like when they stopped catheterization, they also tried to change the placement to another school. It was across town and not only did they stop the catheterization, but they stopped her bus, so that we also had to provide transportation to and from school.

It seems like every time that we would get things going OK, there would be something that would come up to try to make a row, and they did.

Senator WEICKER. What effect did this have on Amber?

Mrs. TATRO. Well, luckily Amber was only 3 when this began. But it does have an effect on her, because there for a while she had no school to go to. And you know, it would just break my heart when she would say, "Mommy, why cannot I go to school; all my friends are going to school."

But right now she does not realize what this was all about. I took her to the court because I felt that everybody needed to see what child you are talking about. And she hates going to court, but she loves school and she gets along well with her peers, and she has a good school. And all the people in the school are great. It is the administration and the school board that we have had all the problems with.

A lot of times, school boards do not realize what administrations are doing, and a lot of the harassment came direct from the superintendent of the schools.

At one point, when we finally got her into the school and the bus was picking her up, the schoolbus was being followed by a truck from the school district to time her to see how long it took her to get to school and get in her chair. This is because I had asked, you know, she was the only child on the bus, and I said, could you get her there 15 minutes early so that she could have some time with her peers? Well, no. They did this for 2 weeks, and I finally called a school board member and I said that I was tired of that. So that harassment ceased.

But you know when a child has a person behind them with a stopwatch to see how long it takes them to get to her chair and when she got to her chair, the bell was ringing, that was how close they timed it. But it was nothing but pure harassment.

We finally got a special education director in Irving that knew what special education meant, that was his field. The education directors we had had before had been people who they had pulled out of the Irving system and just went and got them a certificate so that they could be the director and I am sure they were taking directions from the superintendent.

Senator WEICKER. Mr. Abrahamson, I understand that when the school district appealed the decision in your case you were financially unable to continue the litigation.

If the Massachusetts Advocacy Center had not stepped in at that point, what would you have done?

Mr. ABRAHAMSON. Well, it was a real question of where to turn? I suppose that I would have scratched around and possibly you know, it is hypothetical, possibly pulled together the resources to proceed, but I think that it is a very important question because a lot of people that would not have even gone half as far as I did, because they just did not know about organizations like Massachusetts Advocacy.

There are a lot of people who are just not reached by these situations and it would have been very, very difficult even for me, who was aware of some of the support organizations, advocacy organizations out there.

Senator WEICKER. Mr. Dussault, one question for you.

It has been suggested by some that the awarding of attorneys' fees should be limited to costs associated with court actions only and not be allowed the costs associated with administrative hearings.

What is your response to that suggestion?

Mr. DUSSAULT. I suggest that that is a very shortsighted view. If you look at the statistics on special education advocacy, using the broad term, well over 90 percent of the cases are resolved at the administrative level. That is where the burden of most of these actions take place. And very few cases are actively litigated. If you dissuade the awarding of attorneys' fees at the administrative level you have, again, taken away any incentive to negotiate in good faith at the administrative level, waiting for courts to resolve the issue.

By the time that you get to court, most of the time, the parents have incurred attorneys' fees at a minimum of $5,000 and often much, much higher than that. So placing that burden of not allowing the award in administrative procedures, you are still interposing a substantial barrier to the parents proceeding.

I see parents with these kinds of cases, literally three, four, or five a week. And now maybe the issue for that parent is a $50 additional expense per week for physical therapy or occupational therapy. I am forced to tell them that they are going to have to spend at least $1,000 and maybe $5,000 in an extended administrative hearing in order to win $50 a week. And I am also forced to tell them that there is no way they are going to recover those out-of-pocket expenses in the administrative proceeding to gain a very small benefit. What is happening unanimously now with the parents that see me is that they are simply deciding not to fight. By not allowing the awards for the administrative proceeding, you are encouraging the situation that parents are going to have to either go all the way, or not be able to go at all.

Senator WEICKER. Senator Kerry?

Senator KERRY. Mr. Chairman, thank you all for your testimony today.

Mary, I would like to just touch on a couple of things if I can.

Did you have any contact with public officials or with any kinds of people in various positions of authority outside the school system in an effort to help you?

Mrs. TATRO. Well, I had written to my Congressman and my Senator, and you know, once you start a due process hearing there is nothing that they can do because you have to go through the channels.

Senator KERRY. What about within the community itself, on the local level, did you make any efforts to try to impact the school system from the outside?

Mrs. TATRO. Well, when we first went to the due process after they made a decision to appeal to the State board, I called some of them, and the attitude was, "We do not do medical services."

And I had asked the officials, in the beginning, the school board, I had asked the superintendent of schools to ask the school board, you know, tell them our problems and see if we could work it out.

I had been in several meetings, even before the ARD meeting, you know, giving them facts, why she has to have it, her doctor's testimony. The school district brought in testimony and it was just—the more you tried, it seemed the harder they worked against you. There was just no getting through to them that Amber had to have catheterization because without it she would be damaged.

We were in the Fifth Circuit Court and the attorney was asked by the Judge what was her alternative education? And after much stammering, he finally said, a urinary diversion would be one. That was the attitude. I mean, they said, well, we have had kids in the Irving school district with spina bifida before. Yes, they had. Most of them have part of their kidney. But this was a new procedure and it was endorsed by the American Academy of Pediatric Urologists, and I had given them all the paperwork.

You know, I had dealt with them a couple of years, even before we were supposed to go for the ARD meeting, because I felt that they needed to have all the facts. But they had all the facts, it was just their determination that they were not going to do anything that was not on their "what-we-will-do-for-the-school-kids" list.

Senator KERRY. Is that what they described to you? What did they say to you as their reasoning? What was their excuse for this continued reluctance to respond to you?

Mrs. TATRO. Well, the initial decision, we went through the whole everything and we finally got down to the catheterization issue, and the special education director said we cannot provide catheterization, we cannot provide anything that is not on our list of medical things that we do.

And I said, well, fine, I will see you in the Supreme Court, not ever thinking I would, but unfortunately they took me. I did not take them. You know, and that is what a lot of people forget.

I mean all that we wanted was Amber to be able to go to school. There was no school for Amber. We looked at the school in the area for the disabled children and because of her higher intelligence, I mean, she was excluded from there. And they could have said, well, we will contract her to Dallas which is across the bridge, but they offered me nothing. They said, take it or leave it.

Senator KERRY. Now that it has been resolved, can you tell us after all is said and done what, from your perception, the school system has had to lay out, how their attitude might have changed as a consequence of all of this harassment?

Mrs. TATRO. Nothing has changed their attitude. It is my school that is good. Amber has got a super principal, and a nurse and everybody is great with Amber. But when you get over to the administration, it is not the same.

I mean, even in the paper last week, the assistant superintendent made the statement, that well, you know, that this was just an isolated case to Amber, that this had no impact on other children and that everybody that came before their ARD committees, you know, would more or less be on their own. In other words, each thing would be a separate decision, which of course it is anyway. But I think that the attitude would be that if they did not want to do it in Irving, another type, say, physical therapy, they would still fight it.

I had a parent call me the night before I left to come up here in the Richardson School District, the nurse has taken it upon herself to quit catheterizing this child. And this child had a part of one kidney. And it is vital that she have catheterization. Because of the trouble, they said, well, we have just stopped doing it, because we do not want to. So I mean right now he is in the process of going after the Richardson School District, but they do not take Public Law 94-142 money. But they can get them under 504 I believe.

Senator KERRY. One final question to you, Mary, if I can.

You obviously have a very special spirit and sense of perseverence, but I wonder if you could describe in perhaps greater depth, more personal terms, what this did to you as a family and what this did to you in your community as you went through this process?

Mrs. TATRO. Well, I did a lot of crying. You know, it seems like every time that you would turn around, they would come back with something else. And you just had to be strong enough to sit down and think about it and see what you were going to do next. Because it was a battle, I mean a regular battle. I have got three scrapbooks full of clippings on the case.

Like I say, you know, having a friend to talk to sometimes, you can get your frustrations out by just talking it out, but Amber was in the hospital one time, for instance, and the doctor from the school district went to the hospital attempting to see her charts on the floor. And took a person from the school district with them. I mean, that is harassment. But they did not get to see the charts. But this was because I told them that she would be back in school on Monday and we expected to have catheterization and the like, and that is when I took the court order and the prescription with me.

But the judge, the last time that we were down there for a contempt motion, he told them, the attorney from the school district, "Well, this is an ARD committee decision." They were overturning a Federal judge's decision by the ARD committee. They were determined that they were not going to do catheterization and it did not make any difference what it took.

Right now, she is getting catheterization. I mean there is no problem with it. The nurse, even if she is not at the school every day, she is at a school about a mile away, and she just comes when it is time. And Amber is doing her own catheter by the way. She just needs some assistance with her getting everything ready or she would be in there all day otherwise. But she has learned to do the catheterization, taught by the school district.

Senator KERRY. Thank you.

Mr. Abrahamson, I always thought that Sharon was a bastion of progressivism and I am surprised. Let me ask you, if I can—how did you draw the conclusion, what gave you the knowledge that the program initially was inadequate? Did some outside source inform you, or was this intuitive, or was this your own perception?

Mr. ABRAHAMSON. Well, there are a lot of rather easy clues when it comes down to it. You could speak to teachers in certain day programs, and you watch the child as he grows and see if there is any progress and then suddenly—because there are no programs at all available otherwise for the child.

We took a chance and sent him to, at our own expense, to a summer camp one year run by schoolteachers who were just running a summer camp. These teachers were out of New York City and they had a camp in upstate New York, Reinbeck, NY.

And it came as a great surprise to us that there were a whole lot of things that this child could do that they taught him. And we decided that he needed a program all year round that in many ways emulated what they had done with him at this camp. But that was before the act was in effect, and we were obviously very happy when both chapter 766 and the Federal law, Public Law 94-142 came into effect, because that gave us the opportunity to try out these things in a full-time program.

Senator KERRY. And I would ask you the same question, as Mary. What was the response of the school? What was their reasoning for their reluctance to try to assist you?

Mr. ABRAHAMSON. I think that it just boils down to money really. We are in a period of economic decline, as you know, Massachusetts 2½ came along which limited taxation on property in the towns. In Massachusetts the towns run their own school committees.

Senator KERRY. Have you ever done an accounting of what they spent in administrative proceedings and in their own legal fees versus what it would have cost?

Mr. ABRAHAMSON. No, I have not.

I found it difficult to communicate in some ways with them after all of these proceedings, but I suppose that I should be more curious at this point. However, the school committee took the attitude that OK, we will try this kid out in a—they did help us find a residential program which was rather austere. And it ran something like $9,000 or $10,000 a year which is not very much in that kind of a program—with the notion that maybe in a year or two he would be cured and that would be a good investment. And after he was cured, he would go back to a regular school program.

And it was really, the bottom line was money all the way because when I fought them for a better program, and the school superintendent put obstacles in our way, we found that it was simply a matter of jumping to a $10,000 program to about a $35,000 program at the time. And proposition 2½ was in effect, and there was no money, that was what it amounted to.

Senator KERRY Was there any evidence that Danny was harmed during the course of this process, developmentally?

Mr. ABRAHAMSON. That is very difficult to say. We feel like, and we have had expert witnesses testify that he does show signs of regression when he is not constantly reinforced—with mentally retarded kids and he has some autistic like behavior as well, you have to reinforce everything that he learns or otherwise he loses it. And without that constant repetition during the day, you know, you reward good behaviors and you neutrally redirect so called bad behaviors, and if you do not do this consistently all day long, and into the evenings and in the morning, training for his activities for daily living and so on, he loses it.

And we have one example, to answer your question directly, where he had been somewhat toilet trained, for instance, at about

age 12, in that summer camp and then when he went back to his regular program, he lost that.

Senator KERRY. Just a final question that I would like to ask you as I did Mary.

How did this impact your family relationship and community relationship? Was there a strong negative impact on that, or how would you describe that?

Mr. ABRAHAMSON. It has to. There are obviously great stresses within the family. I think that it had a serious effect on our eldest daughter. Danny is in between two girls, and I think that it affected her quite a bit. I think that in some ways it affected my performance on the job, because I spent so much time following the case with my wife. Our relationships with our neighbors in the town, it is a small town.

We decided just to keep a low profile because there were a lot of people with the attitude, I think, that basketball uniforms and football uniforms are what education is about and I am sure that it is important, but it is a process of education that has to take place in the entire country before people realize that everyone is entitled to an education.

Senator KERRY. Thank you, Mr. Abrahamson.

Just one question for Mr. Dussault.

Is there anything in the mediation process that could be changed or improved that might result in a less contentious litigious consequence?

Mr. DUSSAULT. I think that we come back to the issue of equality between the parties. Mediation will only work if both parties assume that there is a risk of unsuccessful mediation. I would hold great hope for a mediation process as a halfway position, if there was some sort of sanction for the failure of mediation ultimately, such that if there were an attorney's fee provision or a sanction against inappropriate performance, or an allowance, such as in Burlington, to allow the parents to unilaterally place, in the event of an inappropriate program—then I think mediation would have something to say for it.

But when no one is at risk, or when one side perceives the mediation as not being important, then it is used solely as a delaying tactic, and when the delays operate against only one party in the process, then I cannot suggest it or support it.

Senator KERRY. Thank you all, not only for your testimony but for your advocacy. I appreciate it.

Thank you very much, Mr. Chairman.

Senator WEICKER. Thank you very much, Senator Kerry and to every member. We appreciate your testimony.

The last panel to testify will consist of Edwin Martin, now from Albertson, NY, the former Director of the Bureau of Education for the Handicapped, and Mr. E. Richard Larson, an attorney for the American Civil Liberties Union of New York.

While they come to the table, we will give our good friend here a recess.

The committee will stand in recess for 3 minutes.

[Whereupon a short recess was taken.]

Senator WEICKER. The committee will come to order.

With that, why do we not proceed in the order that I announced.

Mr. Martin?

STATEMENTS OF EDWIN W. MARTIN, PRESIDENT, HUMAN RESOURCES CENTER, ALBERTSON, NY, AND E. RICHARD LARSON, ATTORNEY, CIVIL LIBERTIES UNION, NEW YORK, NY

Mr. MARTIN. Thank you, Mr. Chairman.

Thank you, Mr. Kerry and other members of this committee.

I am Edwin W. Martin, president of the Human Resources Center in Albertson, NY, which is the home of the National Center on the Employment of the Disabled. From 1969 to 1979, I was privileged to serve as the Director of the Federal Bureau of Education for the Handicapped, and in 1980 was nominated by the President and confirmed by the Senate to serve as the first assistant secretary for Special Education and Rehabilitation Services in the new Department of Education.

I am here today to offer support for S. 415, which amends the Education of the Handicapped Act to authorize the award of reasonable attorney's fees, and which would clarify the effect of the Education of the Handicapped Act on rights, procedures, and remedies under other laws.

I might say simply that I think that this legislation is extremely useful and vital to the appropriate implementation of Public Law 94-142. I had the opportunity to work closely with Senator Stafford and other members of this committee and their staffs as well as parents and educators during the time from 1971 to 1975 when the bill was developed and a key premise of the bill was to assure that parents and disabled children would be able to have full due process protections under the law. When I came to Washington in 1966 for the first time, it was to serve as staff director for the Ad Hoc Subcommittee on Handicapped in the House.

And we began the first hearings which led to the Education of the Handicapped Act being passed in 1967. We took more than 1,000 pages of testimony in that committee from parents and found that only one handicapped child in five was receiving appropriate special education. And that the parents could be turned away by school districts when they sought enrollment. There was not one State in the United States that offered full opportunity for education of those handicapped children. Many States had mandated such programs, but none was enforcing them fully and most had exclusionary provisions, which allowed the school districts to turn away children. Parents had no recourse at all.

It is hard for any of us who did not talk with parents or who did not face these problems personally to imagine the distress that parents face when a school district told them, "We cannot help you, go away." These conditions persisted until the implementation of 94-142 a decade later, and in some limited instances, still persist as we have heard today.

In other situations, children were placed inappropriately in existing special education programs. I do not know how many times parents told me about having their child, let us say, a cerebral palsy child with normal intelligence placed in a classroom for the retarded because that was the only class available. Or how children were often sent off to a state school when they could have been

educated in their home community. Children with learning disabilities or emotional problems were told by the schools that they were lazy and not motivated. One of the most inappropriate placements was to take all the children who were disabled and put them in one building without regard to their educational needs, but just because it was administratively convenient to have all the classes there. Whole groups of children—children with Down's syndrome, for example, were frequently classed as needing to be in a State institution without regard to the fact that they might have the ability to benefit from a school program, a special education program.

The problems that I mentioned did not disappear entirely with the passage of Public Law 94–142, nor as the result of the decisions in a number of Federal and State courts. Based on these experiences the Congress developed the due process procedures to assure parents of a mechanism for appealing decisions which they felt were inappropriate. In the years between 1976 and 1981, I had the overall responsibility for managing the Federal Government's special education and rehabilitation programs and for attempting to improve the performance in the States in their efforts to implement the new law. Each year our staff visited States and we found that while improvement was noticeable, there were continuing problems. We discovered failures to provide physical and occupational therapy and other related services such as catheterization, and we found children placed inappropriately, we found inappropriate IEP's. We found failure to provide due process protections. We found a variety of other problems. A number of these problems resulted in litigation. Some of them under section 504.

I might say here that Public Law 94–142 does not provide a full range of effective mechanisms for dealing with individual problems. While the law provides the due process procedures which are conducted at the local and State level and the ultimate resolution at the court level—the only remedy really available to the executive branch is to terminate funding to the State, or through the State to terminate funding or delay funding sometimes during the approval process of a State plan in the school district. This is both legally cumbersome and politically and educationally unattractive and, in fact, has seldom been done. Although, as the Senator knows, I frequently did delay funding to a number of states until we tried to have some leverage to them and in many instances that did work.

Senator WEICKER. The problem is, as you correctly infer, the problem is that the impact of that falls on the child and not the wrongdoer which is the State.

Mr. MARTIN. And that is the point, that in order for the system to work well in protecting children, the parents' opportunity to participate in hearings at the local and State level and ultimately to seek judicial relief must be encouraged. Without an effective due process system there is really no protection for children and parents in the law through the administrative process.

The protections of section 504 and the diligent compliance efforts of the Office of Civil Rights to enforce this law have proven critical to the effective function of Public Law 94–142. I might add here that I am disappointed that the Federal Government's efforts in

monitoring and compliance have been so markedly reduced since 1980.

I could not help but think, when I listened to Mrs. Tatro, that in 1980 we clarified the regulations after a very careful process to indicate that clean intermittant catheterization should be provided under Public Law 94-142 and that regulation has been in effect since 1980. It took a great deal of care to get that regulation thought through. Judge Hufstetler, who was then Secretary of Education, reviewed it personally very carefully and it is, of course, the basic intention that was put into place at that time, that the Court affirmed in that case. It should have been possible for the school district and the State of Texas to decide that on the basis of that regulation in 1980.

It should be pointed out here that local school districts in the States have complied with Public Law 94-142 and their record in providing education for all handicapped children has really been quite good. The number of situations where problems occur is small. For example, if 99 out of 100 children were educated without an appeal, there would still be 42,000 hearings among the population of 4.2 million children. If 999 cases out of 1,000, which would be a very good record indeed, worked smoothly, there would be 4,200 hearing cases annually.

The fact of the matter is that for the last year for which the information was available, 1983, the National Association of State Directors of Special Education identified only about 1,400 cases and only 67 cases went to court action.

The total number of administrative hearings declined in a comparable group of States from 1,800 in school year 1979-80 to approximately 1,100 in school year 1983-84, and the percentage was reduced by 39 percent over those years, during which time the remedies that would be available through 415 were in place, for the most part.

What I wish to communicate is that the relief that we seek, while critically important to the integrity of this system, as well as to the 1,000 or more families who might be involved, is not likely to exhaust the resources of the educational system. Why is it so critically important then?

First, in my experience with administering the law, the parents who have the least resources available to them in terms of income and education, and sometimes they are parents without familiarity with our language and culture, are much less likely to use the due process system than are parents who have more sources available to them.

Further, the group of children whose parents may have less income and who face more complicated problems in their environment need the resources of the education of the Handicapped Act most critically.

I know the distinguished members of this committee, a number of whom are attorneys, know how expensive it is to prepare a case for Federal district court. I might add here that I know of parents who have faced legal fees of $4,000 for a due process hearing alone, not court action.

And it is hardly something that the average parent can afford. Should the case require an appeal or possibly go on to the Supreme

Court, the expense becomes impossible to bear for all but a few wealthy parents. And the inability to cover attorney's fees will not only stifle the rights of these people with low or middle income, but virtually any parent unless that parent is able to find free legal service. Perhaps more importantly for all children, without the possibilities of court relief the due process hearing system will lose its effectiveness.

School districts are generally represented by attorneys at local and State hearings. Without legal recourse, the parents will have to give up on their attempts to rectify their child's problems as we have heard so well from the other panel earlier.

I think that one of the first times that I faced this, Senator, was a very interesting situation. A gentleman who was a general counsel of one of the Cabinet departments went through a due process hearing on his own child and told me how beaten and battered they were by that experience. They had decided to hire their own counsel and had paid the fees for it for the hearing. During the hearing, the school district resisted, implying that there was a great deal of responsibility on the part of this gentleman and his wife for the child's problems and so forth and so on. And he came back and he said to me; "You know, I never had quite appreciated what all of this was about, until I, as a former corporate attorney, and the general counsel of the Cabinet department got beaten around the ears. And if I cannot deal with this thing, how do other parents do it?"

That experience has stuck in my mind all of these years as I have thought about the need for 504 and the need for Public Law 94-142 legal resources.

I think that there is a good balance, by the way, under S. 415. The school districts can save dollars by settling the cases promptly. The parents, on the other hand, really risk losing everything if the case is not found in their favor. It is hardly a one-way street. And the school districts already have a good deal of advantage. They appoint the hearing officers, they train the hearing officers and so the process does not begin on completely neutral turf, even starting as it does.

In the course of my work in my teaching, I try to stay in close touch with parents of handicapped children and informed of the issues raised in the courts. I have been interested, for example, in the *Burlington* case, which as mentioned was just resolved 2 weeks ago. Here the parents also went all the way through the Supreme Court. In this case, I might say that it is kind of interesting as Senator Kerry well knows, that the State of Massachusetts eventually became on one side of this issue and the school district on the other—the case is *Burlington* v. *Massachusetts*. And the court, as you know, awarded the costs of educating the youngster in a private school, something that the parents had been fighting for and had won at most levels throughout. But at the end of all of that, again, no legal fees, and so we have this ironic circumstance of going all the way through the courts, to the Supreme Court, getting tuition paid for the school year 1979-80, but no legal fees as a result of it.

I am serving now on the mayor's commission on special Education in New York and there have been two historic Court suits

there, *Jose P.* v. *the Board of Education* and the *Laura* case, and in both public-interest lawyers were involved and in both they gained settlements affecting the lives of tens of thousands of children in New York City.

Since the *Smith* v. *Robinson* decision, these public-interest lawyers are not able to recover their legal fees, and they have had to sharply reduce the number of cases they can do and particularly individual cases. They have to try and preserve themselves for class action kinds of situations. And as the members of this committee know, that really flies against the very soul of this act. This act is designed to focus on individual needs, on individual situations, on individual education plans, on individual participation of parents, and on the individual reliefs which are possible, when situations are appealed through the due process procedure. If the due process system cannot allow parents to pursue these protections, the heart of the law is erased.

And I did just want to point out, as both of you distinguished Senators know, the resources available to public interest law firms are limited as well. And as a person who is not an attorney and bears no interest in private attorneys' fees and so forth, I think that it is difficult to see a situation, as I see directly in New York, where the few resources that are available are now having to cut back their assistance to individual parents.

We need to do everything possible to encourage a greater proportion of parents to take an active part in the education of their children, to take advantage of the opportunity to speak on behalf of their child, if they feel a situation is justified. Parents feel overwhelmed by the prospect of arguing a child's case before the school officals, to say nothing about school board attorneys. I do not know how many parents have told me, it is not an easy matter to face the principal, the school psychologist, the teachers, all the experts and to try to say that you think that you know something differently than they do. If they face extreme expenses, facing appeal decisions through the administrative and judicial system, they are clearly going to have to waive the protections that the Congress intended.

I would like to say, in closing, that as a person who has worked for 32 years now, I am extremely grateful for this committee and for the leadership of Chairman Weicker, for the kind of activities that the committee has been involved in, since the advent of his chairmanship. Since its creation, this committee has played a critical role in helping children and adults with disabilities. I remember discussing the need for it with Senator Williams before it was organized, under the earlier leadership of Senator Randolph and Senator Stafford and Senator Williams and the other members of the committee. Major gains were made for people with disabilities, but the battles of recent years particularly, have required great courage and insightful leadership and I know I express the feelings of parents and educators when I express our appreciation to you, Mr. Chairman, and for the work that you and your colleagues have done.

Thank you for the opportunity to testify. I hope the full Senate and your colleagues in the House will approve your efforts, perhaps recognizing that today is your birthday, might see this as a delayed

birthday present for parents and children as well as for you, to re-establish the protections under 504 and other similar acts that were available during the first years of implementation of Public Law 94-142 and which have proven to be most necessary and useful.

Senator WEICKER. I want to thank you very much and we will get back to questions.

Let us hear then from Richard Larson, an attorney for the American Civil Liberties Union.

Mr. LARSON. Thank you, sir.

Senator THURMOND. Mr. Chairman.

Senator WEICKER. Yes, Senator Thurmond.

Senator THURMOND. I wonder if you could permit me about 2 minutes since I have another meeting?

Senator WEICKER. Of course, go right ahead.

Senator THURMOND. I regret that scheduling conflicts prevented my earlier attendance at this hearing, but nevertheless I am glad to be here and look forward to reviewing the testimony which has been presented today in order to make an informed decision on the merits of this bill.

Mr. Chairman, I believe that such an informed decision can only be attained by having an opportunity to hear diverse views on legislation as important as the bill that we consider today. Such a decision would include consideration of the impact this measure may have on the Federal judicial system, public school administrators, members of public school boards, and other interested citizens.

In my statement before this subcommittee on April 1, 1985, on the issue of advocacy for mentally ill persons, I said that it would only be reasonable and fair that State and Federal agencies have an opportunity to respond to the testimony presented, if they desired to do so. I am sure that no one can object to hearing both sides of a matter. Today I repeat those concerns and enlarge them to include the need for the committee to hear from spokespersons for affected local school authorities. For the benefit of those Senators who have not made a decision on the merits of this bill, I think this is necessary. Personally, I would like to learn more about this bill.

I respectfully request that those who may be affected by this legislation, but whose views may differ from those of the fine panel before us, be allowed the fundamental right to be heard. Having emphasized the need for completeness and fairness, Mr. Chairman, I do want to welcome all of the witnesses who have testified today and I shall be interested in carefully studying what they have to say.

Senator WEICKER. I thank the distinguished Senator from South Carolina for his comments. The record will remain open for at least a week to 10 days for those who care to go ahead and submit additional testimony.

I received the letter of my good friend, Senator Thurmond, relative to a request made by the National School Board Association. I would like the record to show right now that this legislation was introduced originally in July 1984. These hearings were put together and I approved the final witness list on April 29, 1985. We had no request from the National School Board Association until May

2. At that time we were in the middle of other hearings, and I gave approval 2 days ago to their testifying in person and I have indicated that they could certainly submit any statements that they care to for the record, and statements will be considered. I agree that we want to have all points of view. I think that it has to be pointed out that the request to testify was a tardy one indeed. The invitation to testify, and it was given 48 hours ago, was declined. And so, for whatever reasons—I am not going to speculate—we would be glad to have their testimony submitted for the record, and the record will remain open to receive that.

Senator THURMOND. Mr. Chairman, I might say that the school boards felt that 2 days' notice was not enough. The National School Board——

Senator WEICKER. They had a year's notice.

Senator THURMOND [continuing]. Would like to submit a statement for the record.

Senator WEICKER. They had a year's notice.

Senator THURMOND. I think that it would be proper if we could invite both sides to come and appear. It seems that the impression is that only those who favor this legislation have been invited to come and appear here and have television advantage. The other side should be allowed to be heard, too.

As I said, I want to study this bill. I have not made up my mind on it, but I do think that on any piece of legislation, both sides should be heard. This is the point that I am trying to make.

Senator WEICKER. The point is well taken and the record will remain open for the submission by the National School Board Association or any other group or individual that cares to do so.

Mr. Larson?

Mr. LARSON. Senator Weicker, I would like to open by thanking you and Senator Kerry and the entire subcommittee for the leadership that you have shown in trying to eliminate discrimination against the handicapped.

I would also, Senator Weicker, like to thank you for introducing legislation that you did last July and reintroducing again, the legislation as S. 415 this year. And, along with everybody else in the room, I am sure, I would like to wish you a happy birthday, Senator Weicker.

I believe that I am here in my capacity as the counsel for Thomas and Ursla Smith and their son, Tommy, in the Supreme Court last year. I have the unfortunate distinction of being the losing attorney in that case. It was a case that we certainly did not expect to lose at all. I have had a number of arguments in the Supreme Court. I considered *Smith* v. *Robinson* to be the easiest case that I had ever had up there and it was my first loss. I was very surprised.

S. 415 is necessary to overturn *Smith* v. *Robinson*. In my prepared statement, I address two separate things. One, why S. 415 is necessary to overturn *Smith* v. *Robinson* and the second subject is simply a matter of equity, that S. 415 is necessary to provide handicapped children with the same rights that are already provided under our civil rights laws to lots of protected groups; to older Americans, to racial minorities, to women, and to many others.

On the first point, the necessity of overturning *Smith* v. *Robinson*, let us turn to *Smith* itself. As you stated at the outset of these hearings, Senator Weicker, *Smith* v. *Robinson* not only denied attorneys' fees in the context of handicapped education, but it deprived handicapped children of preexisting rights and remedies. It did so based upon a finding that Congress perversely in 1975 had itself denied rights and remedies to handicapped children when it enacted the Public Law 94–142. That is simply wrong.

But the result of the *Smith* decision is that handicapped children today are much less well off than they were in 1975 when the monumental legislation was passed by Congress. S. 415 rectifies the mistake that the court made in *Smith* v. *Robinson*. It does so in three steps. It authorizes attorneys' fees, it restores to handicapped children their preexisting rights and remedies, and it makes the fee authorization retroactive to the date of *Smith*. It is a commendable piece of legislation to overrule *Smith*, an objective which I think is absolutely necessary.

The second point is that, indeed, S. 415 is nothing more than a piece of legislation giving to handicapped children, children least able to protect themselves in this society, the same rights and remedies that are available to older Americans, that are available to racial minorities, to women, to other protected groups.

Again, this is done through three steps. First, there is an authorization of attorneys' fees. This is hardly unique. Congress has enacted more than 150 Federal statutes authorizing attorneys' fees for the rich and sometimes for the poor as well. For the rich, for example, some of the earliest attorney fee statutes enacted by Congress were the Securities Act of 1933 and the Securities and Exchange Act of 1934. Indeed, when a corporation sues another corporation for an antitrust violation, the corporation is entitled to attorneys' fees under the Clayton Act, if the plaintiff is the prevailing party.

More recently, Congress, of course, in the last 20 years has enacted a large variety of fee statutes for those who have been discriminated against when they prevail. For example, Age Discrimination in Employment Act, the Equal Pay Act, the Fair Housing Act, title II and title VII of the Civil Rights Act of 1964 and literally dozens upon dozens of others.

In addition to authorizing fees in general in litigation, section 2 of S. 415 authorizes fees in administrative proceedings. That too is consistent with the other fee shifting statutes. The Supreme Court held in *New York Gaslight Club* v. *Carey*, that where there is a mandatory exhaustion requirement, indeed fees are available. Handicapped children should be treated no less well than others who have to go through administrative mandatory proceedings.

S. 415 restores to handicapped children all preexisting rights, remedies and procedures. And this provision, too, places handicapped children on a par with other persons who are protected by Congress against discrimination. Let me give you an example. Let us say that a school teacher is denied equal pay for equal work. That school teacher has a civil rights remedy under a comprehensive Federal statute, enacted in 1964 and amended in 1972, which is title VII of the Civil Rights Act of 1964 as amended.

But that teacher also has a remedy under the Equal Pay Act of 1963, which provides for double backpay and a means of liquidated damages, and there are different procedures. Additionally, that teacher can assert constitutional rights through section 1983. This is just one example of the fact that discriminated against persons in other areas of society have remedies that sometimes overlap and they are able to pursue their remedies. Handicapped children should not be treated any less well.

The third point is that as S. 415 makes the fee authorization retroactive and applicable to pending cases, that is standard in fees law. Once again handicapped children should not be treated less well.

This bill is simply, in my view, a matter of fairness, but it is more, of course, than a matter of fairness. It is rectifying the record of what this Congress, I think, quite clearly did back in 1975.

The ACLU strongly supports this legislation.

Thank you.

[The prepared statement of Mr. Larson follows:]

Prepared Statement of
E. Richard Larson
on behalf of the
American Civil Liberties Union

on S. 415, the
Handicapped Children's Protection Act

before the
Subcommittee on the Handicapped
Committee on Labor and Human Resources
United States Senate

May 16, 1985

On behalf of the American Civil Liberties Union, I commend this Subcommittee and Chairman Lowell Weicker, Jr. for their leadership in seeking to end discrimination against the handicapped. S. 415, the "Handicapped Children's Protection Act of 1985," is a necessary component in this continuing effort to end discrimination against the handicapped. The ACLU fully supports S. 415 and urges its enactment.

In this Statement, I will briefly address two interrelated subjects: (1) the necessity of enacting S. 415 so as to overturn the Supreme Court's decision last year in Smith v. Robinson, and thereby to restore to handicapped children the legal rights and remedies which were previously accorded to them; and (2) the necessity of enacting S. 415 so as to provide handicapped children with legal rights and remedies similar to those which are currently available to older people, to women, and to minorities who are subjected to illegal discrimination.

1. S. 415 Correctly Overturns the Supreme Court's Decision in Smith v. Robinson

In Smith v. Robinson, ___ U.S. ___, 104 S.Ct. 3457, 82 L.Ed.2d 746, 52 U.S.L.W. 5179 (U.S. July 5, 1984), the Supreme Court not only held that Congress had never intended to authorize court-awarded attorneys fees to the parents or legal representatives of handicapped children who have been denied their legal or constitutional rights, but also held that Congress in enacting the Education for All Handicapped Children Act [hereafter the "EAHCA"] in 1975 had perversely repealed by implication all pre-existing rights and remedies protecting handicapped children.

The High Court's assignment of such a pernicious intent to Congress is certainly questionable since Congress in 1975 quite explicitly sought to add to the legal protections accorded to handicapped children, see, e.g., S. Rep. No. 168, 94th Cong., 1st Sess. 17, 23 (1975). Nevertheless, the Supreme Court held otherwise, with the result that handicapped children are now accorded less protection than in 1975 when Congress enacted the EAHCA.

S. 415 quite appropriately would overturn Smith v. Robinson and would fully restore to handicapped children all pre-existing rights and remedies. The bill accomplishes this objective in three steps.

First, § 2 of S. 415 authorizes the courts in "any action or proceeding" brought under the EAHCA to "award a reasonable attorney's fee as part of the costs to a parent or legal representative of a handicapped child or youth who is the prevailing party." This provision squarely rejects the Supreme Court's bottom line result in Smith v. Robinson, and correctly authorizes

the very awards of attorneys fees which are absolutely necessary for parents and legal representatives to obtain the assistance of legal counsel to enforce in reality the legal rights afforded in theory to handicapped children. If § 2 is not enacted, parents and legal representatives will ordinarily not be able to retain counsel and accordingly would be unable to assert most effectively, if at all, the legal protections accorded to handicapped children.

Second, § 3 of S. 415 provides that nothing in the EAHCA "shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes prohibiting discrimination." This provision squarely rejects the very premise of the Supreme Court's decision in Smith v. Robinson (the premise that Congress through its enactment of the EAHCA in 1975 had implicitly repealed all pre-existing rights and remedies protecting handicapped children), and correctly restores to handicapped children the previously available rights, procedures and remedies. If § 3 is not enacted, it will mean, for example, that an illegal or unconstitutional educational policy could not be challenged through a class action, which is the most convenient and inexpensive method for parents and educational agencies alike to resolve policy disputes affecting large numbers of handicapped children.

Third, § 4 of S. 415 makes the foregoing fee authorization in § 2 applicable to actions or proceedings brought "after July 3, 1984," or "pending on July 4, 1984." This provision completes

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the overruling of Smith v. Robinson by effectively filling in the gap between the date of the Supreme Court's decision and the date upon which S. 415 becomes law. If § 4 is not enacted, fee awards will be unavailable in any interim action or proceeding, and fee awards similarly would be unavailable to parents such as Thomas and Ursula Smith who through counsel totally vindicated the legal rights of their handicapped son Tommy throughout six years of litigation.

Each of the foregoing provisions of S. 415 is necessary to overrule completely Smith v. Robinson. S. 415 is well drafted to accomplish this necessary objective.

2. S. 415 Correctly Provides Handicapped Children With Legal Rights and Remedies Similar to Those Accorded to Others Who Are Subjected to Illegal Discrimination

Enactment of S. 415 is particularly important to restore to handicapped children legal rights and remedies equivalent to those currently accorded to others who are subjected to discrimination. Unfortunately, as the law now stands, handicapped children are provided substantially less protection against discrimination than are older people, than are women, and than are blacks and other racial minorities. S. 415 would remove these inequities by restoring equivalent rights and remedies to handicapped children, a group undeniably deserving congressional protection rather than congressional discrimination.

S. 415 would accomplish this protective goal (of providing equivalent rights and remedies), once again, through the same three steps.

First, § 2 of S. 415 authorizes court-awarded attorneys fees. This is hardly a unique congressional remedy. In fact, Congress has already enacted more than 150 fee statutes, particularly as a remedy for those who have been discriminated against. For example, fees are authorized by the Age Discrimination in Employment Act through 29 U.S.C. § 626(b); by the Equal Pay Act through 29 U.S.C. § 216(b); by the Fair Housing Act through 42 U.S.C. § 3612(c); by Title II and Title VII of the Civil Rights Act of 1964 through 42 U.S.C. § 2000a-3(b) and 2000e-5(k), 1/ respectively; and of course by the Civil Rights Attorney's Fees Awards Act of 1976 [hereafter the "Fees Act"] through 42 U.S.C. § 1988. The need for these fee statutes has been made apparent by Congress, time and again, through legislative findings fully applicable here. For example, as stated by Congress in enacting the Fees Act: "civil rights laws depend heavily upon private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain." S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976) (emphasis added). The reason for the essential importance of fee awards is self evident: "In many cases arising under our civil

1. Consistent with the fee provision in Title VII which authorizes fees for time spent by counsel in mandatory administrative exhaustion proceedings to enforce Title VII rights, see New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), compare Webb v. Board of Education of Dyer County, 53 U.S.L.W. 4473 (U.S. April 17, 1985) (no mandatory exhaustion under § 1983), § 2 of S. 415 correctly authorizes fees for time spent by counsel in mandatory administrative exhaustion proceedings to enforce EAHCA rights. Handicapped children, in other words, are properly provided no lesser protection by S. 415 than is already provided to other victims of discrimination in other contexts.

rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer," which in turn means that without the potential of fee awards citizens would not "be able to assert their civil rights." Id. Accordingly, as Congress has also recognized: "If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting." Id. at 6. In other words, unless the EAHCA is to become a mere hollow pronouncement which the financially strapped parents and legal representatives of handicapped children cannot enforce, Congress must guarantee access to legal counsel as provided for in § 2 of S. 415 so as to vindicate the important policies which the EAHCA contain.

Second, § 3 of S. 415 restores to handicapped children all pre-existing rights, procedures and remedies. This provision too is designed to place handicapped children on a par with other persons who are protected by congressional bars against discrimination. For example, Congress' enactment of Title VII of the Civil Rights Act of 1964 certainly did not deprive women and minorities of pre-existing constitutional and statutory protections against discrimination, Johnson v. Railway Express Agency, 421 U.S. 454 (1974); similarly, Congress' enactment of the Fair Housing Act of 1968 certainly did not deprive minorities of the pre-existing protection against discrimination in the Civil Rights Act of 1866, Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968). Nor should Congress allow it to be said that enactment of the EAHCA deprived handicapped children of pre-existing cons-

titutional and statutory protections. Handicapped children, in other words, are entitled at a minimum to the same pre-existing protections as are other people who are victims of discrimination.

Finally, § 4 of S. 415 makes the fee authorization in § 2 applicable to pending actions or proceedings. This provision is similar to the standard interpretation and application of Congress' more-than-150 fee statutes. See, e.g., Hutto v. Finney, 437 U.S. 678 (1978) (Fees Act); Bradley v. School Board of Richmond, 416 U.S. 696 (1974) (ESAA). The parents and legal representatives of handicapped children are entitled to no lesser protection.

Conclusion

S. 415 not only is important legislation; it is necessary legislation. Without full rights, procedures and remedies being available to parents and legal representatives of handicapped children, their rights will become less than mere hollow pronouncements.

The ACLU fully supports the enactment of S. 415, and commends this Subcommittee and Chairman Weicker for moving quickly toward that goal.

Senator WEICKER. Thank you very much.

I really appreciate the testimony of both of you in terms of your experience, Mr. Martin, with HHS, and yours, Mr. Larson in the *Smith* v. *Robinson* case.

I understand that representatives from the National School Boards are in the audience, and I hope that they understand that the offer was sincere, that they submit their testimony for the record.

It is my intention to bring this matter to markup within the next 2 weeks, and to report it out. We are not going to delay. If anybody wants delay, they can have it on their own heads.

It seems to me that there is an inequity here that deserves to be remedied. I think that I can answer, so that there is no holier-than-thou attitude in the room, which precipitates all of these battles, be it by school boards, or be it by States. I was appalled that my State of Connecticut filed an amicus brief in *Youngberg* v. *Romeo*, in effect saying that a State owed no more than custodial care. I thought that this was a point that we had gone by many decades back.

Here is the State of Connecticut, which I consider progressive, just as my good friend, Senator Kerry, considers the State of Massachusetts, filing an amicus brief supporting that limited obligation, insofar as the State is concerned. And I think that I can give the answer, whether it is the school boards that are going to fight these things down to the last inch, or whether it is the States filing those kinds of briefs, my own State of Connecticut included: money. Pure and simple: money. They do not want to spend the money, that clearly the law indicates now has to be spent.

S. 415 gives to these American citizens nothing more than anybody else, the same as everybody else. Yes, more funds might be involved in that. But that is not reason enough, in my book, for either the State government or the Federal Government or any local authority to go ahead and take these people and harass them.

If anybody is worried about there being a proliferation of lawsuits, let me assure you, and I am sure that the various attorneys that are involved in this, the parents that are here, believe me, if you have a child, a member of your family with a disability, you have got all that you can do without worrying about going into court. Nobody wants to go into court. I do not know one person who wants to go into court.

On the other hand, that the opportunity in America should be the same for their children as anybody else's child, I think that is a rather reasonable expectation on the part of any parent. And that is what is at issue here.

The conflict is one of the law versus those who want to save money at the expense of a population which they consider to be too weak to fight back.

Well, we have seen some very courageous people here today who have fought back. And I can assure you that Senator Kerry and myself and I suspect that a large majority of the U.S. Senate is perfectly prepared to hardball on this issue. If somebody wants to fight, well, they have got one.

Senator Kerry.

Senator KERRY. I join 100 percent in your comments—and unfortunately I have to leave.

I just want to ask one question, if I may, to Mr. Martin.

In your testimony you cited the Office of Civil Rights and the lack of compliance and monitoring that is going on.

I wonder if you could just take a moment and document that since 1980?

Are you prepared to do that, or perhaps would you like to just submit that in writing? But I would like to have that for the record.

Mr. MARTIN. I will submit that in writing, but I can say that I have had a number of conversations with State officials thinking here about monitoring under Public Law 94-142. I was recently in California for a meeting of the Council for Exceptional Children and spoke with the State education agency people responsible for administering the special education. They have not had a site visit on Public Law 94-142 since 1980. That is an example of the policy I am talking about.

Senator KERRY. I appreciate your testimony and the testimony of the whole panel, and in particular the comments that were just made by the chairman.

I guess that we are beyond the point of being baffled by it, but no matter how one serves or no matter how much one is in public life, the constancy with which we seem to see cheap decisions made by people in public life and the constancy with which we see a willingness to make such short-term, such shortsighted kinds of decisions which wind up ultimately costing society so much more, ultimately in expenditures—it just is a source of constant consternation.

And I certainly join with the chairman in saying that this kind of basic fundamental right is so essential to our system and to who we are and what we are and what we stand for, that I join with him. I am sure that I speak for my colleagues who are not here in saying that this is a fight that we are certainly willing to stand up for and to take to the floor and I think ultimately can win on, and will.

And I applaud the chairman.

[Additional material supplied for the record follows:]

Consortium for Citizens with Developmental Disabilities

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STATEMENT

RESPECTFULLY SUBMITTED

TO THE

SUBCOMMITTEE ON THE HANDICAPPED

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES

OF THE

UNITED STATES SENATE

ON

THE HANDICAPPED CHILDREN'S PROTECTION ACT OF 1985

ON BEHALF OF

THE COALITION FOR CITIZENS WITH DEVELOPMENTAL DISABILITIES

TASK FORCE ON EDUCATION

American Academy of Child Psychiatry
American Occupational Therapy Association
American Physical Therapy Association
Association for Children and Adults with Learning Disabilities
Association for Retarded Citizens, US
Center for Law and Education
Center for Law and Social Policy
Conference of Educational Administrators Serving the Deaf
Convention of American Instructors of the Deaf
Disability Rights Education and Defense Fund
Epilepsy Foundation of America
National Association of Private Residential Facilities for the Mentally Retarded
National Association of Private Schools for Exceptional Children
National Association of Protection and Advocacy Systems
National Council on Rehabilitation Education
National Head Injury Foundation, Inc.
National Recreation and Park Association
National Rehabilitation Association
National Society for Children and Adults with Autism
Spina Bifida Association of America
The Association for Persons with Severe Handicaps
United Cerebral Palsy Associations, Inc.

May 22, 1985

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The CCBD Education Task Force is pleased to submit testimony in support of S. 415, the Handicapped Children's Protection Act. The Education Task Force is comprised of a number of major national organizations who are concerned about the provision of quality special education and the rights of children with handicaps and their families. These organizations representing teachers, parents, administrators, university professors, providers of related services, and children and youth with handicaps share a common bond of commitment to the full implementation of P.L. 94-142, the "Education For All Handicapped Children's Act" (EHA).

Passage of S. 415 is essential to overturning the Supreme Court decision in Smith v. Robinson which placed the protection and enforcement of the educational rights of children in with handicaps serious jeopardy.

o BACKGROUND

In 1975, P.L. 94-142 was passed in response to a history of discrimination which resulted in the exclusion and segregation of children with disabilities from public education. While there has been substantial progress in the decade since EHA passage, much work still needs to be done to assure that every child with a disability is provided a free appropriate public education.

In developing the EHA, Congress determined that parental participation in all aspects of educational planning and decision-making was pivotal to securing appropriate educational services for children with disabilities. Congress sought to guarantee parental participation

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through a system of procedural safeguards. Among these procedural safeguards are the right to examine records, to be assured non-discriminatory evaluations, to seek an independent evaluation, to receive notice of any decision to change the identification, evaluation or educational placement of the child and to participate as an equal partner with school district personnel in the preparation of the individualized education plan (IEP). These procedures were intended to produce a mutually agreed-upon educational plan and to resolve disagreements informally.

However, Congress was well aware of the fact that the right to parental participation in the planning process does not automatically guarantee appropriate services or resolve disagreements in all instances.* Congress, therefore, developed a formal administrative hearing procedure to resolve disputes which were not resolved through the IEP process. Either party has the right to initiate the due process hearing procedure. An impartial hearing officer presides. Each party has the right to examine and cross-examine witnesses and present documentary evidence which is often technical or medical. A written decision must be issued within specified time-lines. Either party may appeal the administrative decision to court and is entitled to a trial de novo. It is these due process protections which gave parents the right and ability to challenge school district decisions which denied children with handicaps a free appropriate public education.

Smith v. Robinson

Last July the Supreme Court decided in Smith v. Robinson that the EHA was the exclusive avenue of relief for a parent pursuing a claim for a free appropriate education for their child. In particular, the Court

*A recent Supreme Court case, Burlington School Comm. v. Mass. Dept. of Ed.-------U.S.-------(1985, recognized that this cooperative approach would not always produce a consensus between the school officials and the parents, and that in any disputes the school officials would have a natural advantage..."

overturned prior practice which allowed parents to recover attorney's fees under Section 504 of the 1973 Rehabilitation Act (as amended) or the Civil Rights Attorney's Fees Award Act in cases brought jointly under the three statutes.

This decision has had a devastating effect on the ability of parents to secure a free appropriate education for their children.

We strongly support S. 415 which seeks to overturn the Smith v. Robinson decision and amend P.L. 94-142 to allow a court to reimburse parents for their costs including legal representation. Since P.L. 94-142 does not specifically authorize award of attorneys fees, the majority of low and middle income parents can no longer afford to challenge a school district's decision on the education of their children. The Education Task Force strongly believes that the protection of the educational rights of children with handicaps should not be limited only to those parents who are economically advantaged.

As reported by the Congressional Research Service*, Congress has authorized the award of attorney's fees in virtually all civil rights actions brought under federal law. Attorneys' fees may be recovered for civil rights violations under the following federal laws: the Civil Rights Act of 1964 (titles II, III, VI, VII), the Fair Housing Act of 1968, the Fair Labor Standards Act, the Age Discrimination in Employment Act, the Age Discrimination Act of 1975, the Equal Credit Opportunity Act, the Voting Rights Act of 1965, the post-Civil War acts (42 U.S.C. Sec. 1981, 1982, 1983, 1985, and 1986), Title IX (the sex discrimination prohibition), the Rehabilitation Act of 1973, the State and Local Fiscal Assistance Act of 1973, the Civil Service Reform Act of 1978, and the Civil Rights of Institutionalized Persons Act.

*See, Supreme Court Holds That Awards of Attorney's Fees Are Not Permitted Under the Education of the Handicapped Act, Henry Cohen, American Law Division, July 6, 1985.

Passage of S. 415 will demonstrate Congress' continued commitment to the promise extended in 1975 that children with disabilities will no longer be treated as second-class citizens and will be guaranteed appropriate educational services.

o THE NEED FOR REIMBURSEMENT OF ATTORNEY'S FEES TO THE PREVAILING PARENT, STUDENT OR GUARDIAN IN ANY ACTION OR PROCEEDING UNDER THE ACT.

It is important to consider this issue within the context of the reality faced by parents of children with disabilities. Some opponents of this bill would have Congress believe that parents have nothing better to do than pick needless fights with their school districts. Nothing could be further from the truth. It is virtually impossible to convey the time, energy and costs involved in raising a child with a disability. Parents with children living at home, are responsible for all aspects of daily care. For many children this involves all areas of daily living: eating, toileting, dressing, hygiene, transferring (lifting). While all parents expect to care for their young children in this way, parents of children with disabilities must often continue this care throughout the teenage and young adult years. Day care and after-school programs are generally unavailable to children with disabilities. In most cases, any relief from the daily regimen must be paid for by the family. Added to this is the tremendous expense and time involved in designing and obtaining equipment and going to medical appointments. For children with physical disabilities, public transportation is often unusable and lift-equipped vans prohibitively expensive. Each recreational, medical or other outing requires planning and expense. These are just a few of the things parents have to cope with every day.

To this daily reality is added the time and energy involved in securing appropriate educational services. Along with the comprehensive new set of parental rights in the EHA came a new set of responsibilities. Most parents cannot automatically exercise these rights. Besides issues of time and expense, many parents are intimidated by the authority and complexity of the educational bureaucracy. It is not easy for many parents to walk into a meeting with four or more professionals. Class and race differences exacerbate the difficulty. Some parents still accept as a fait accompli the decisions of school officials. While Congress believed, and we strongly concur, that parents are the primary experts on their children, they are often not treated as such. Education and training by parent groups have helped many parents attain the skills and confidence to fulfill their role under the Act. For all parents who become involved, participation in the educational process require a considerable amount of time and energy.

In most cases, parents do not formally challenge school district decisions. Despite efforts by some to confuse the issue, the informal procedures established by Congress are not affected by this bill. If an IEP can be agreed upon and it is implemented, the issue of attorney's fees does not arise. Attorney's fees only become relevant when the formal hearing procedure and/or court action was necessary to secure the Congressional guarantee of a free appropriate education.

It is critical to realize that the decision to pursue a formal complaint or file for a due process hearing is an incredibly hard soul-searching decision for most parents. Parents do not wish to be in an adversarial position with school officials. Parents are acutely aware that they will have to deal with these people for as many as 18 years. Anyone in this situation would prefer a good working relationship. The

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formal due process hearing procedure and court action are taken as a last resort after all efforts at informal resolution have failed and the parents are convinced that the disputed area is of critical importance to their child. Even then, in many instances parents just do not have the time or emotional reserves to initiate the process.

It is a fundamental issue of fairness that parents who must pursue a formal hearing or court action in order to secure a free appropriate public education for their child be awarded attorney's fees if they utilize the services of an attorney and prevail. Many parents would not even consider pursuing the due process hearing procedure if they had to represent themselves. It is a very intimidating process that takes its psychological toll on the child and family. It should certainly be easy to understand how difficult it would be for a parent to cross-examine school officials and teachers, even if a parent had the requisite knowledge to do so. Moreover, school districts often employ attorneys to consult, prepare and/or present the district's position in these hearings. It is ironic that the National School Board Association's Council of School Attorneys, with over 1,900 members, testified on H.R. 1523 that fees should be denied at the due process hearing level in order to keep the hearing "informal and cooperative." It is also ironic that parents are in effect paying for their school district's attorney through their tax dollars, while the school boards argue against their right to be represented as well.*

Another fallacy being promoted by some in opposition to the bill is that attorneys will be clamoring at the doors of parents of disabled children with disabilities, encouraging them to pursue cases that they

*School boards which do not use lawyers to present cases at due process hearings use personnel specifically trained to conduct hearings.

would not otherwise pursue. Again, parents will not go through the pain and anguish of a hearing or court action just so that their attorney can be paid his/her regular fees. No parent looks forward to exposing their child's personal and medical information or being cross-examined about their position regarding their child's education. The availability of attorney's fees simply assures fair access to hearings and court for those parents who are in the painful position of having to pursue such avenues in order to attain appropriate educational services.

The CCDD Education Task Force fully supports the "action or proceeding" language in S. 415 to cover reimbursement for costs resulting from administrative and court hearings. This language is consistent with current case law. In New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980), the Supreme Court held that similiar language in Title VII of the 1964 Civil Rights Act authorized courts to award fees to the prevailing party in the administrative hearing level or in court because the Act required exhaustion of the local or administrative procedure before proceeding to court.* The reasoning of the Court is equally apt under the EHA:

> It would be anomalous to award fees to the complainant who is unsuccessful or only partially successful in obtaining state or local remedies, but to deny an award to the complainant who is successful in fulfilling Congress' plan that federal policies be vindicated at the state or local level.

As the NSBA acknowledged in their testimony before the House on H.R. 1523, "courts that have awarded attorney's fees for the costs incurred at

*The recent case of Webb v. County Board of Education of Dyer County------U.S.------(4/17/85) has no impact on the Gaslight decision. In Webb the Court denied fees at the administrative level because they were not mandated under the statute.

administrative hearings held under the Act have reasoned that since the EHA, like Title VII, requires parents to first exhaust their administrative remedies before seeking judicial relief, then prevailing parties under the EHA are also entitled to recover legal fees for the costs of proceedings to which they must submit under the federal statute before going to Court" (p. 5). Several courts have followed this reasoning in EHA cases.**

In conclusion, S. 415 assures fair and equal access to the formal procedures established by Congress in the EHA. Moreover, the award of fees only becomes applicable when the hearing and/or court action was necessary to secure the basic right to a free appropriate public education guaranteed by Congress in 1975.

**The following decisions have awarded fees for the administrative due process hearing under the EHA: Gary B. v. Cronin, 542 F. Supp 102 (N.D. Ill. 1982); Patsel v. D.C. Board of Education, 530 F. Supp. 660 (D.D.C. 1982); Davis v. D.C. Board of Education, 530 F. Supp. 1215 (D.D.C. 1982); Capello v. D.C. Board of Education, 3 EHLR 553:6c95 (D.D.C. 1982); Hilden V. Evans, 3 EHLR 552:299, 301 (D. Oregon 1980); Roe v. Riles, C.A. No. C-81-1602 MHP (Slip Opinion) (N.D. Cal. May 25, 1982); Department of Education v. Valenzuela, 524 F. Supp. 261 (D. Hawaii 1981); Department of Education v. Katherine D., 531 F. Supp. 517 (D. Hawaii 1982); see also, Espino v. Bestro, 708 F. 2d 1002, 1010 (5th Cir. 1983).

o THE NEED TO RESTORE THE RELATIONSHIP BETWEEN THE EHA AND SECTION 504, SECTION 1983 AND THE U.S. CONSTITUTION

Prior to the Supreme Court's decision in Smith v. Robinson, parents had available alternative means of securing their child's right to a free appropriate public education. Contrary to the decision in Smith, Congress was aware of these other alternatives and intended to add to them when it enacted the EHA in 1975. It is important that legislation to overturn Smith reaffirm that Congress did not intend to take away rights, but to enhance rights when it enacted the EHA.

Of particular concern to parents is the continued vitality of the administrative enforcement procedures under Section 504. At the outset it is important to point out that Smith v. Robinson in no way affected the authority and responsibility of the Office of Civil Rights of the Department of Education to process Section 504 complaints. Smith itself only involved court actions. OCR's responsibility was established by Congress and the procedures were endorsed and codified in 1978.* However, in the months following Smith there was uncertainty as to the Administration's position regarding the continued jurisdiction of OCR on elementary and secondary education complaints. We are pleased that Secretary Bennett has recently reaffirmed the role of OCR.

The ability to file Section 504 complaints with the Office of Civil Rights is the most critical alternative remedy for parents. Unlike the formal due process hearing, which as we described above is emotionally draining and requires a considerable amount of available time, the OCR complaint system allows the parent to file a letter outlining their concerns and requires investigation, resolution or enforcement by the

*See, Consolidated Rail Corp v. Darron, 104 S. Ct. 1248 (1984).

regulatory agency. Moreover, in many instances a hearing is unnecessary. If a school district refuses to comply with a provision of the law, a parent should not be forced to go through a hearing to achieve compliance. The federal government has the responsibility of assuring that all recipients of federal funds comply with the law.

The CCDD Education Task Force fully supports the purpose and intent of S. 415 to clarify Congressional intent that P.L. 94-142 and Section 504 provide alternative means of protection for children with handicaps.

o Two Additional Issues

The CCDD Education Task Force seeks support for two amendments to S. 415. The first amendment would require the appropriate educational agency to make available for public review the decisions which result from impartial administrative hearing at the local and state level with due protection for individual privacy. This amendment should help encourage earlier resolution of disputes between parents and school systems and improve the substantive and procedural quality of administrative hearings and reviews under the Act. We believe that this public access provision will enhance the ability of all concerned parties to monitor the provision of a free appropriate public education for all children with handicaps.

The second amendment would bar educational agencies from reimbursing prevailing parents with EHA funds. It is our belief that these federal dollars should be limited exclusively to the provision of special education and related services to children with handicaps.

o Conclusion

The CCDD Education Task Force strongly supports Senator Lowell Weicker's leadership in introducing S. 415, the Handicapped Children's Protection Act of 1985 to respond to the adverse Supreme Court decision

in Smith v. Robinson. The CCDD Education Task Force believes that these amendments to P.L. 94-142 should be for the limited purpose of clarifying what has always been the intent of Congress--to protect the educational rights of children with handicaps.

The Handicapped Children's Protection Act (S. 415) is a measure to fully restore to children with handicaps the pre-esisting rights and remedies which the court took away from them. The CCDD Education Task Force urges broad Congressional endorsement and swift passage of this legislation to guarantee that children with handicaps have access to the feee and appropriate public education which is mandated in P.L. 94-142.

On this the tenth anniversary of the enactment of P.L. 94-142, we look to the Congress to reaffirm their commitment to children with disabilities and their families. We cannot wipe out this decade of progress.

NATIONAL SCHOOL BOARDS ASSOCIATION
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TESTIMONY
on behalf of the

NATIONAL SCHOOL BOARDS ASSOCIATION

on

S. 415 "HANDICAPPED CHILDREN'S PROTECTION ACT OF 1985"

before the
SUBCOMMITTEE ON THE HANDICAPPED
U.S. Senate

Submitted for the Record
May 22, 1985

Serving American Education Through School Board Leadership

48-670 O—85——3

Preface

The National School Boards Association is pleased to submit this statement for the record to the Senate Subcommittee on the Handicapped. The National School Boards Association is the only major education organization representing school board members who govern the nation's public school districts. Throughout the nation, approximately 95,000 of these individuals are Association members. These people, in turn, are responsible for the education of more than 95 percent of the nation's public school children.

Currently marking its forty-sixth year of service, NSBA is a federation of state school board associations, with direct local school board affiliates, constituted to strengthen local lay control of education and to work for the improvement of education. Most of these school board members are elected public officials. Accordingly, they are politically accountable to their constituents for both education policy and fiscal management. As lay unsalaried individuals, school board members are in the rather unique position of being able to judge legislative progress purely from the standpoint of public education, without consideration to their personal professional interest.

A. Introduction

The National School Boards Association strongly believes that local school districts, the Congress, and other public agencies must provide the services and financial resources necessary for the special education and related services of all handicapped children. To that end, NSBA supported the passage of the Education of the Handicapped Act (EHA), continously supports increased funding for the program, and works to heighten membership awareness of the law's legal requirements.

Central to providing an appropriate education for each child, the law requires the development of an Individualized Education Plan (IEP) and certain due process procedures. That is, the law provides parents with the opportunity (and right): 1) to work cooperatively with school officials to build programs for their child, and 2) to challenge any plan which they believe is inappropriate to their child's needs. With regard to the administrative procedures, parent protections include the following:

- the right to an individual educational program for their child
- the right to obtain an independent education evaluation of their child,
- written notice before any changes in the child's placement or program are implemented,
- the opportunity for an impartial due process hearing by the local education agency,
- impartial review by a state education agency, and
- the right to judicial review, where necessary.

Overall, the system operates best when parents and school officials work directly with one another, and when areas of controversy are resolved in a speedy and informal manner.

B. Summary of S. 415

Prior to the U.S. Supreme Court's decision last year in Smith v. Robinson, the courts were split on awarding attorneys' fees to prevailing parents under EHA. Smith v. Robinson held that EHA did not intend that fees be awarded for actions brought either at the court or the administrative levels.

By contrast, the bill S. 415, would amend EHA as to: a) make fees available to prevailing parents at both the court and administrative level, b) enable parents to elect either the procedures under EHA, or go directly into court under Title V of the Rehabilitation Act and other civil rights statutes, and c) make the availability of fee awards retro-active to actions pending as of July 4, 1984.

Although S. 415 grants the courts the "discretion" to award attorneys' fees, court precedent would make such fees awardable as a matter of course — unless specific limitations are provided in the legislation itself. Hence, under S. 415 school districts, acting in good faith, would be routinely liable for prevailing plaintiff fees at the court level — as well as at the time of initial determination at the hearing level.

In addition to Smith v. Robinson, which is controlling, several other Supreme Court decisions provide insight into the attorneys' fee issue (e.g., New York Gaslight Club v. Carey, Webb v. County Board of Education). However, in the final analysis, Congress, with the guidance of court interpretations, can proceed as it chooses to determine how best to serve the objective of this special education program.

In turning to NSBA's specific comments on the bill, we would urge that the Subcommittee consider the balance between maintaining a system which, without controversy, efficently handles 4.1 million cases, but which with equal efficiency and fairness — to the child's benefit — must handle those 1,400 situations each year that reach the administrative or court levels.

C. Recovery of Fees at Administrative Level

Those advocating the recovery of fees at the administrative level argue that the threat of additional costs is a necessary club by which school districts will be forced to negotiate with parents.

We believe that the above argument is based on several erroneous premises. First, it should be clear that special educators are personally committed to serving the needs of handicapped students. If there is a "mind-set" in the nation's schools, it is to work cooperatively with parents to develop IEP's. This is accomplished successfully for over 4 million children each year — and without the involvement of attorneys.* We are concerned that the bill

* There may be a misconception that school systems routinely use attorneys at the IEP level. Especially since practically all school systems use outside counsel for all legal matters, the regular use of such attorneys at the IEP level is simply unrealistic.

encourages the involvement (and posturing) of lawyers at the IEP level -- thereby setting up adversarial relationships (and postures) at stages when parents and school officials should still be dealing directly with one another.

Second, even when disagreements do arise requiring a first level hearing, school districts do negotiate. This is reinforced by the fact that increasingly state systems are requiring mediation. Even in non-mediating states, hearing officers frequently seek an initial mediating role, rather than to simply judge cases. According to data provided from Connecticut, for example, approximately 75% of all cases submitted to mediation are successfully resolved. Under S. 415, will attorneys really work to negotiate, if obtaining a formal decision, in which obtaining a "win" in some aspect of the matter is necessary to shift part or all of the costs from the parent to the school system?

Third, the underlying theme of the bill is that, if the financial risk of holding its judgement is too great, the school system will be more inclined to provide the services requested by parents. It should be recognized that under current practice, the school district already assumes considerable costs in standing behind its decision. Win or lose, the school system pays for its own attorneys, experts, staff, and, in some states, for the hearing examiner, reporter, and other hearing costs (which can involve several thousand dollars). Special educators are interested in working with parents, and in making correct decisions. Those decisions involve the determination of what is an appropriate program, which can include expensive placement decisions, (e.g., residential placements) unusual related service (e.g., whole family psychiatric care), and decisions regarding school safety (e.g., student

discipline). School officials generally operate in good faith, and make their decisions based on professional judgements and what they feel obligated to do. Decisions also can involve legal questions, such as, whether year-round school is required, defining certain related services, or how to handle student discipline cases. School districts should not be coerced from good faith efforts to obtain determinations of legal issues which could potentially involve many students — current and future. In the final analysis, there would appear to be a major difference between invoking a mechanism to assist prevailing parents who are in financial need, and utilizing a mechanism which also has the "chilling" effect of discouraging school officials away from making educational decisions which they feel are correct.

Fourth, in recent Senate testimony, one witness estimated that administrative procedures can cost parents from $3000 - $5000. The awarding of attorneys' fees will, of course, financially help those parents who prevail. However, does the bill raise expectations to pursue hearings for those who believe in what they seek for their child — but who are not correct? Given that decisions are split between parents and school districts, will S. 415, standing by itself, increase financial hardship by inviting cases that should not be brought?

The administrative hearing, is frequently the first time an impartial third party is given the opportunity to judge all factors — and make an educational judgement. The emphasis should be on informality. Meanwhile, it is urged that the financial costs of obtaining administrative judgements are too great. Yet the direction of this bill is to increase the formal adjudicatory nature of the hearing procedure, as well as the costs.

Perhaps the time has come to broadly review the administrative procedure itself — rather than to assume that more "lawyering" is the best approach. For example, if S. 415 had no provisions dealing with the payment of attorneys' fees at the administrative level, would it then be useful to add language that the school district's attorney could not be present at the hearing, if the parent had no attorney present?

D. Determining Attorneys' Fees at the Administative Hearing Level

Under S. 415, the awarding of attorneys' fees at the administrative level would be made by the courts. In other words, an entire process of filing papers, making motions, presenting the necessary arguments, trips to out-of-town federal courts, and so on, might have to be made for the sole purpose of determining hearing level fees. Depending upon the situation, the fee determination procedure could take on a life of its own. *

Additionally, S. 415 speaks of awarding "reasonable" attorneys' fees. This term is somewhat vague. Does it mean a "reasonable" fee for administrative actions brought in the city in which the federal court is located, does it mean the "community" rate where the school district is located, does it mean the hourly rate paid to the school district attorney, or does it mean something else?

* On the other hand, there could be difficulties in having the hearing officers themselves establishing attorneys' fees. As non-lawyers, hearing officers would not be knowledgable in fee practices, or how to apply legal principles relating to this area. Further because of the punitive nature of the fee, the hearing process becomes more aljudicative -- perhaps bringing in other issues of administrative law.

The limited experience of courts in making determinations as to "reasonable" attorneys' fees for representation at the administrative level will not assist them in dealing with the issues involved in EHA administrative proceedings. The usual administrative proceeding involves a determination as to whether a person has been subjected to discrimination.

The due process proceeding under the EHA is unique. The issue to be determined is what future educational services are to be provided to a handicapped child. In addition, the administrative process goes beyond the scope of the due process hearing, included in civil rights laws such as title VII, to include conferences and meetings between teachers, psychologists and special education officials and, of course, the I.E.P. development.

In determining what is "reasonable" the court will be called upon to look at a myriad of areas which are not the traditional domain of the courts, particularly where the parties settle the case at the administrative proceedings and the court is called upon to resolve only the attorneys' fees issue. Some of the questions which must be answered include:

- What is a "reasonable" fee for attorney services for appearances at conferences during the development of the individualized education program for the child?

- Are the cost of experts during the I.E.P. conference "costs" of the action?

- If, after the initial I.E.P. conferences are completed, the parents and the school district agree as to the placement of the child, have the parents "prevailed?"

- If the parents and school district agree as to placement, but disagree as to other issues, such as the pupil-teacher ratio in the class or some other minor matter, do the parents "prevail" if it is later determined that they are correct on that issue?

- What other "costs" are awardable?

- If the only issue to be determined by the court relates to the question of attorneys' fees, will the court have to "retry" the substantive issues involved in the administrative proceedings in order to determine who "prevailed" and what is a "reasonable" fee?

- Are "escalators" awardable for cases which the court determines are particularly difficult? If so, must the court retry the case in order to make that determination?

- If the parent is represented by an attorney for an advocacy group which itself receives federal or state funding, are attorneys' fees awardable? What if the group receives funding under another federal handicap act?

- Is the "cost" of attorneys' fees the "cost" to the parent or the "reasonableness" of the fee charge, regardless of whether the parents are obligated to pay the fee?

- Have the parents "prevailed" if they lose on the main question (such as a question relating to placement) but win on a procedural question such as the type of notice given? If so, how is the "reasonableness" of the fee determined in that situation?

- Are fees awardable for all conferences, telephone calls etc. with the school district on the education of the child from the outset of the child's enrollment in the school district, if the school district, either because or spite of their own educational assessment, decide to comply with the parents' demands?

- May the court take into account the fact that the parents or their attorney unnecessarily prolonged the administrative proceedings?

- If the parents, in an appeal from the EHA administrative procedures, add a class action component to the case, can the parents recover fees for the administrative proceeding if they prevail only on the class component? For example, in G.A.R.C. v. McDaniel the court ruled that the individual representative children did not prove a need for an extended school year, but the court ruled in favor of the class.

NSBA urges the Subcommittee to review how the courts will administer this amendment and make decisions on attorneys' fees awards in this unique type of action - particularly with regard to administrative proceedings.

E. Recovery of Fees at the Court Level

At the court level, NSBA does not support precluding those school districts from paying prevailing party attorneys' who are brought to court because of demonstrated bad faith, or who use the courts in a bad faith manner.

On the other hand, among the cases going to court the following possibilities also exist: 1) the parent is appealing a lower administrative or court ruling supporting the school districts, and/or 2) a previously unresolved legal issue is involved, e.g.: When is year-round school required? When is a particular type of service or expense a related service? How should discipline cases be treated? In cases such as these, assuming the school district is otherwise acting in good faith, we question the punitive nature of an attorneys' fee.

F. Opposition to Alternative Remedies

In the case of Smith v. Robinson, the Supreme Court held that where the EHA is available to a handicapped child asserting a right to a free appropriate education, the EHA is the "exclusive avenue through which the child and his parents or guardians can pursue their claim". As a result, parents no longer have the option of by-passing EHA procedures and moving directly into court to assert the same claim under either Title V of the

Rehabilitation Act of 1973 or under the Equal Protection Clause. Section 3 of S. 415, would reinstate multiple remedies. * The question raised is, as a matter of public policy, should EHA be the exclusive remedy?

In considering the public policy question, it might be helpful first to compare the scope and nature of EHA protections with those relating to discrimination. EHA is an educational program, which includes a process through which school officials and parents must work together to build an IEP for the child. Where disagreements or failures to act arise, there are local and state impartial hearing procedures, (leading to possible court action) to formulate the IEP. The remedies provided under section 3, deal with questions tied to discrimination -- and do not specifically include processes by which an educational program is built between parent and school district. More specifically the following comparisions can be drawn between EHA and §504:

- §504 is broader than EHA because under §504 the child must have a physical or mental impairment which substantially limits one or more major "life activities". Under EHA the question is whether the child needs special education. A child who is denied access to the classroom because of herpes, for example, may be handicapped under §504, but not under EHA.

* Section 3 would amend EHA by permitting alternative remedies "under the Constitution, Title V of the Rehabilitation Act of 1973, or other Federal Statutes prohibiting discrimination" (i.e., 42, U.S.C. 1983, 1988).

- On the other hand, §504 is narrower than EHA because, while it prohibits discrimination, it does not impose affirmative requirements on school systems (Southeastern Community College v. Davis, 442, U.S. 397 (1979). That is, while EHA and its administrative protections deal with the substance of what is an appropriate special education, §504 does not.

- As a non-discrimination statute, handicapped students seeking relief under §504 are entitled only to the same due process procedure as non-handicapped students. However, EHA goes further and requires a full-scale hearing before an independent hearing examiner, the right to counsel, and substantive rights including a hearing before a change in placement is made.

From the foregoing it is clear that parents of handicapped students who are asserting claims of a violation of their right to a free appropriate public education are fully protected by EHA and do not need recourse to section 504 except in those cases where the EHA clearly does not apply.

Hence, since it is not necessary to provide alternative remedies, what policy questions should be considered in deciding whether to do so?

First, EHA provides a comprehensive mechanism for developing educational programs. Indeed, there is no other law that so thoroughly establishes individualized programming through parental participation. In addition to the IEP itself, the success of this program is tied to resolving disputes through informal hearings. The success of the hearing process is apparent from recent

annual data which shows that while 1400 cases required due process hearings -- only 67 went to the court level. Therefore, not only are the hearings a component of the program, they are successful. On the other hand, by not requiring plaintiffs to exhaust the remedies of EHA, the EHA process itself is weakened.

Second, it is clear that the costs of resolving areas of disagreement are expensive -- too expensive. "Jumping" into court as a tribunal of first impression will only increase costs -- regardless of who prevails. Additionally, once the situation reaches court, substantive programming issues will tend to be submerged -- as the dynamics of the legal process take over.

Third, the courts themselves have made it clear in several key cases, such as Rowley, that they only want limited involvement in cases that could otherwise be handled through EHA procedures. Even the analysis of the three judge dissent in Smith v. Robinson, (which was limited to a statutory interpretation of Congressional intent) demonstrated that pre-disposition in their choice of language when they stated:

> "The natural resolution of the conflict between the EHA, on the one hand, and §504 and §1983 on the other, is to require a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels established by that Act before seeking redress in the courts under §504 or §1983. Under this resolution, the integrity of the EHA is preserved entirely, and yet §504 and §1983 are also preserved to the extent that they do not undermine the EHA."

G. Conclusion

In 1984, the Attorneys General of Massachusetts and Washington, on behalf of the National Association of Attorneys General transmitted a report to the Congress outlining concerns with respect to the Civil Rights Attorneys' Fees Award Act of 1976. In considering legislation in this area, we urge the Subcommittee to review that report, as well as other bills addressing attorneys' fees and administrative exhaustion issues.

NSBA fully supports the processes established under EHA as a cooperative effort between parents and school officials to build effective and appropriate programs for handicapped children. We believe that the process is most successful when it is informal, de-emphasizes the use of attorneys by all parties, and is allowed to work. In this regard, several key aspects of S. 415 will upgrade the formality, increase the "lawyering", and encourage by-passing the EHA system. We urge the Subcommittee to carefully consider the objectives of the bill, and the underlying concerns which it seeks to redress, and then evaluate how well this bill can attain those goals, in relation to other approaches.

In submitting this statement for the record, NSBA expresses its high regard for the importance of S. 415. Our interest in testifying was presented to the Subcommittee formally and informally on several occasions in 1984 and 1985. NSBA was invited to testify with only one full working day available before the May 16, 1985, hearing to prepare its statement and to fly in an appropriate witness. Given the shortness of notice, NSBA was compelled to decline.

APPENDIX

NSBA urges that the following material (and full report) be considered as points pertinent to attorneys' fee recovery under S. 415

The National Association of Attorneys General has made the following findings and recommendations to Congress for legislative reform of the Civil Rights Attorney's Fees Awards Act of 1976.

FINDINGS OF THE ASSOCIATION

FINDING NO. 1: Litigation under the Fees Act is expanding at an alarming rate with further expansion in the future a near certainty.

FINDING NO. 2: The Act, as interpreted and applied by the courts, makes attorney's fees available not only in civil rights cases but in virtually all cases against state and local governments or officials.

FINDING NO. 3: Cases decided under the Fees Act frequently involve the characterization of parties as "prevailing" for purposes of attorney's fees awards when, in fact, they have not prevailed, in any meaningful sense, on the merits of their claims.

FINDING NO. 4: In cases where the requesting party has, in fact, prevailed to some extent, attorney's fees awards under the Act are frequently disproportionate to the degree of success actually achieved.

FINDING NO. 5: The Fees Act, as interpreted and applied by the courts, makes the award of fees to a prevailing party virtually mandatory, thereby eliminating the "discretion" expressly granted to the courts by the Act.

FINDING NO. 6: Lack of meaningful standards for determining what constitutes a "reasonable" attorney's fee in any given case results in inconsistent and often excessive fee awards and makes it difficult to settle claims for attorney's fees.

FINDING NO. 7: Courts routinely make "bonus" awards or apply "multipliers" to the hourly rates set for prevailing counsel, resulting in grossly inflated awards constituting a "windfall" to prevailing counsel.

FINDING NO. 8: In applying the Fees Act to prevailing parties represented by publicly-funded salaried attorneys, courts normally award fees based on hourly rates charged by private counsel, resulting in windfalls that substantially exceed the actual cost of the litigation.

FINDING NO. 9: The Fees Act affects the process of legal dispute resolution in a way that is unfair to public defendants and that further burdens the courts by:

A. making it more desirable for plaintiffs to commence litigation, rather than settle disputes informally;

B. making it more advantageous for plaintiffs to continue litigation rather than settle where any meritorious claim is presented;

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C. making it less desirable, once litigation is underway, for public defendants to alter challenged laws, administrative regulations, or official positions in any way that favors the plaintiffs;

D. making it less desirable for public defendants to litigate those close issues that should be litigated; and

E. making it difficult for plaintiffs and defendants to settle claims for attorney's fees.

RECOMMENDATIONS OF THE ASSOCIATION

RECOMMENDATION NO. 1: The Congress should amend the Act, as specified in the further recommendations enumerated hereunder, to provide clear and precise standards governing eligibility for and computation of attorney's fees awards under the Act.

RECOMMENDATION NO. 2: The Congress should amend the Fees Act to apply only to civil actions to redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right secured by a provision of the Constitution of the United States or an Act of Congress providing for individual civil rights of citizens or of all persons within the jurisdiction of the United States.

RECOMMENDATION NO. 3: The Congress should amend the Fees Act to require that, in order to be eligible for a fee award, a party must clearly and substantially prevail on the merits of each issue or claim as to which fees are being sought.

RECOMMENDATION NO. 4: The Congress should amend the Fees Act to require that courts apportion the amount of fees awards to the degree of success actually attained by the prevailing party.

RECOMMENDATION NO. 5: The Congress should amend the Fees Act to provide expressly that a court may deny fees where in the court's views, denial is appropriate, including but not limited to, cases in which the court determines:

A. that the defendant's position is substantially justified or advanced in good faith; or

B. that an award of fees would not further the substantive purposes of the Act.

RECOMMENDATION NO. 6: The Congress should amend the Fees Act to provide that the prevailing party shall not be awarded fees in excess of $75 per hour.

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RECOMMENDATION NO. 7: The Congress should amend the Fees Act to prohibit the award of bonuses or multipliers in excess of compensation at a reasonable hourly rate for the number of hours reasonably spent by prevailing counsel.

RECOMMENDATION NO. 8: The Congress should amend the Fees Act to provide that, where the prevailing party is represented by a publicly-funded legal services organization, courts should compute a reasonable hourly rate for such counsel based on the actual costs of the litigation to the organization, including the proportion of the attorney's annual salary and of the organization's annual overhead attributable to the number of hours reasonably spent on the case.

RECOMMENDATION NO. 9: The Congress should amend the Fees Act to provide that the court shall deny attorney's fees to a prevailing party, where it determines:

A. that the lawsuit was brought principally for the purpose of obtaining attorney's fees; or

B. that the prevailing party rejected an offer of judgment made pursuant to Rule 68 of the Federal Rules of Civil Procedure, or a cognate state rule of procedure, that was more favorable than the relief ultimately granted by the court, in which case no fees shall be awarded for the services rendered after the date of the offer.

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THE COUNCIL FOR EXCEPTIONAL CHILDREN

May 13, 1985

The Honorable Lowell Weicker, Chairman
Senate Subcommittee on the Handicapped
303 Senate Hart Office Building
Washington, D.C. 20510

Dear Senator Weicker:

The Council for Exceptional Children (CEC), the national professional organization of persons involved in and concerned with the education of handicapped and gifted and talented children and youth, commends you for introducing S. 415, The Handicapped Children's Protection Act of 1985, and expeditiously scheduling a hearing to consider this most important legislation.

The Council for Exceptional Children played a major role in working with the Congress in the design and passage of P.L. 94-142, The Education for All Handicapped Children Act of 1975. For the past decade we have actively worked throughout the country to assist in the implementation of this most important Act. Last July, we reacted, along with many others, with shock at both the logic and implications of the Supreme Court's decision in Smith v. Robinson which fundamentally severed the relationship between P.L. 94-142 protections and the protections under Section 504 of the Vocational Rehabilitation Act of 1973 and, potentially, other civil rights statutes. We, along with others, called upon the Congress to take corrective action. S. 2859, introduced by this body last year, not only went beyond simply correcting Smith v. Robinson by restoring the relationship between P.L. 94-142 and Section 504, but also for the first time is permitting attorneys' fees to be awarded under P.L. 94-142 directly. Because of this new issue, we urged the Congress to carefully examine the issues before taking acting.

As a part of our on-going examination of this issue, CEC formed a Task Force on Smith v. Robinson to explore in greater detail the issues raised by the court's decision and to make recommendations concerning federal and state policy issues that should be addressed. A copy of this report is attached to this letter.

During the years leading up to the passage of P.L. 94-142, the Congress thoroughly explored the problems associated with educating handicapped children. The Congress recognized that simply guaranteeing handicapped children access to an education was not sufficient in meeting the children's educational needs; thus it chose to guarantee a "free appropriate education." Congress also realized that each child's special educational needs would be different and thus a single standard or even

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multiple standards defining "appropriate" would not suffice. The Congress, with great wisdom, established a process to determine what is "appropriate." The essentials of that approach are:

1. The determination of what a child's special educational needs are and what services will be provided must be made around the individual needs of that child.

2. That parents and schools have an equal interest and opportunity to participate in resolving the question of what is appropriate for the child.

3. That when parents and schools disagree, there be fair procedures available to resolve differences in the best interests of the child.

It is our belief that the process approach, is on the whole, working effectively. The Rand Corporation (1982) in studying the process reported that fewer than 0.01 percent of the students served under EHA become the subject of a formal dispute. While, as our Task Force report indicates, there are some factors that presently constrain parents and schools from the level of advocacy envisioned in the law, in the vast majority of cases parents and schools are working together to reach mutually agreeable determinations of "free appropriate public education."

The issue now before the Subcommittee on the Handicapped, precipitated by Smith v. Robinson, is how to assure the existence of fair procedures to resolve differences in the best interests of the child when the parties cannot agree.

In this regard our Task Force identified four overriding principles:

1. Federal policy should assure that there is an effective balance between the rights and responsibilities of parents and those of the schools.

2. Federal and state policy, including fiscal, should encourage the resolution of disagreements between parties in the shortest period of time and in the most cost effective manner for all parties concerned.

3. The rights of individual professionals must also be considered in a manner equal to the rights of parents and the schools.

4. While utilization of the courts and participation of the legal community is an essential right possessed by all parties, policy should not encourage or weigh in favor of

legal resources as opposed to other forms of dispute settlement.

In addressing these issues it is essential that we keep in mind several points. First, the question is not whether the parents or the schools are "right." The issue is what is appropriate for the child, and we must presume that both parents and schools are equally committed to that objective. Second, the educational needs of handicapped children exist in the present and protracted disputes may often be counter productive to the educational interest of the child. Third, the process under P.L. 94-142 is a human interaction system designed to make educational decisions within a legal framework. The most critical ingredients in effective decision making are communication and trust. While legal process is an essential right of all parties, it should not become a substitute for more appropriate strategies for facilitating communication and trust.

More specifically, in regard to S. 415 The Council for Exceptional Children:

1. Supports the awarding of attorneys' fees under P.L. 94-142 when parents prevail in court. In this regard, we support the view that the court should have discretion as to whether or not fees should be awarded and that the amount of the fees should be based on the nature of the issue, the behavior of the parties, and factors related to reasonable costs.

2. Supports restoring the relationship between P.L. 94-142 and Section 504 of the Vocational Rehabilitation Act of 1973.

3. Supports including a provision prohibitng the use of P.L. 94-142 program funds for the payment of attorneys' fees awarded under this Act.

4. Opposes the broad authority granted through the use of the term "any action or proceeding" as contained in the bill for the following reasons. While The Council for Exceptional Children supports the basic intent and purpose of S. 415, we are greatly concerned about the use of the terminology "any action or proceeding" for two reasons. First, while we support the awarding of court costs to parents who prevail in court, we do not support the awarding of costs incurred in the administrative process except in situations where the school system initiated the proceeding, or where there were substantial procedural violations or significant violations of the requirements of federal or state policy. School systems who fairly carry out their responsibilities in the pursuit of appropriate educational decision making for a

child should not be financially penalized.

Secondly, we are very worried about recent interpretations of the potential application of the term "action or proceeding" based upon the decision of the Supreme Court in New York Gaslight Club v. Carey. It is our understanding that Gaslight would permit parents who prevail at a local or state hearing, and never need to go to court, to seek from the court the payment of the fees they incurred in the administrative hearing process. While we do not believe that it was the intent of the sponsors of S. 415 to authorize the awarding of fees in matters not brought before the courts, we believe that unless clarifying language is added, the implications of the legislation would be much more far reaching than ever intended by the authors. Our concern is to keep the administrative process under P.L. 94-142 focused on the child's educational needs and the determination of what is educationally appropriate for the child, rather than turning that process into a battleground for lawyers.

Such a blanket allowance of recovery of fees under the due process procedures, as authorized in Sec. 615 of EHA, would have the effect of greatly encouraging the involvement of attorneys from beginning to end of all facets of due process proceedings, thus potentially transforming what was intended to be educationally-based due process into quasi-judicial proceedings. It was clearly the intent in the enactment of P.L. 94-142 that due process proceedings authorized by the Act should be conducted with the least possible injection of formal legal confrontation.

There are two other issues that we urge the subcommittee to take into consideration. First, states must play a more active and qualitative role in the process if we are to reduce the need for litigation and encourage better decisions early in the process. In most states when there is a disagreement between the parties a local hearing is initiated, which either party can appeal to the state. In some states the hearing is held by the state. Following a state hearing or appeal either party may go to court. In all instances the state makes a determination and it is this determination that is at issue in court, not that of the local school district. If courts overturn the decision, then the state was in error on either procedural or substantive grounds. When this occurs it is because states have not appropriately trained and monitored hearing officers, or the policies and procedures of the state are not being implemented consistent with the requirements of P.L. 94-142. If states were doing a better job in this area of responsibility, then better decisions would be made more expeditiously, the need for litigation would

be reduced, and less stress would be placed on the judicial system and the parties involved. It is essential, we believe, that this issue be addressed. At the same time we believe the courts should assess fees against the education agency whose decision is being reversed. For example:

1. If the parents win a local hearing and the state education agency (SEA) reverses the decision on appeal, the SEA should be responsible for attorney fees if the court finds in favor of the parents.

2. If the parents win or lose a local hearing, and the SEA finds in favor of the parents on appeal, the local education agency (LEA) should be responsible for attorny fees if it appeals the decision and if the court finds in favor of the parents.

3. If the parents lose both the LEA hearing and the SEA appeal, the SEA should be responsible for attorney fees if the court finds in favor of the parents.

Placing fiscal accountability on the responsible parties should encourage more appropriate behavior on their part.

Secondly, while the process system is the appropriate means for resolving disputes, some issues arise that can be resolved through other avenues if the parties involved know they exist and operate in an efficient and effective manner. An example is the complaint procedure which exists under the Education Department's General Administrative Regulations (EDGAR). Under this procedure an individual or organization who believes that the requirements of P.L. 94-142, or any other education law are not being carried out can complain to the state, who is then obligated to investigate and resolve the complaint. For a number of issues the EDGAR complaint procedure could be a more effective vehicle for resolving conflict than the process procedure under P.L. 94-142. For example, a parent discovers that while his or her child's I.E.P. specifies that physical therapy will be provided, the school has refused to actually provide it. This is an obvious violation of the law. The parent has the right to complain to the state, who should be obligated to require the school district to carry out the I.E.P. and provide the physical therapy. In this example, this is a much simpler and efficient approach for the parent. This alternative, however, is rarely utilized for the following reasons.

1. The public is generally unaware that it exists because it is not found in the P.L. 94-142 regulation descriptive material or training activities.

2. The Office of Special Education has generally not provided guidance to SEAs in this regard nor emphasized it in their monitoring.

3. At the present states generally do not have this procedure effectively operative.

We urge the subcommittee to require the Department of Education to develop further criteria for implementing the EDGAR complaint procedures as they pertain to Part B of EHA, provide technical assistance to SEAs in implementing such requirements, monitor SEA implementation, and to require that parents and professionals be informed about the availability of this procedure and the means of utilizing it.

We appreciate the leadership you are giving to this issue. It is important that legislation be passed correcting the Smith v. Robinson decision. We hope that the Subcommittee will give full and careful consideration to all of the issues so that legislation that is appropriate to further facilitating the realization of the educational needs of all handicapped children can be passed. We respectfully request that this letter be entered as part of the official hearing record on S. 415 and we look forward to working with you on this matter.

Sincerely,

Frede[illegible]k J. [illegible]
Assista[illegible] [illegible]ctor
Dept. [illegible] [illegible]lations

B. Joseph Ballard
Associate Director
Dept. of Governmental Relations

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AMERICAN ASSOCIATION ON MENTAL DEFICIENCY

Please respond to:

H. Rutherford Turnbull, III
Dept. of Special Education
The University of Kansas
377 Haworth Hall
Lawrence, Kansas 66045

May 8, 1985

Senator Lowell Weicker, Jr.
Chairman, Committee on the Handicapped
Senate Hart OB #113
Washington, D.C. 20005

Attn: Dr. Karl White

Dear Senator Weicker:

Thank you for your inquiry into the position of AAMD on S. 415, transmitted to us by Dr. Karl White of your staff.

AAMD strongly supports legislation that will enable parents or surrogates of handicapped children, as defined in the Education of the Handicapped Act, to recover the attorney fees that they incur in securing the rights of their children under the EHA in administrative and judicial proceedings in which they prevail. AAMD believes that the fullest possible recovery of such fees, without qualifying conditions, should be legislated; encloses herewith a copy of its relevant 1985 Legislative Goals, as unanimously adopted by its governing body; and requests that this letter and Goals be entered into the Senate Record of Hearings on S. 415, particularly goals I-a and III.

Very truly yours,

Ruth Luckasson

Ruth Luckasson, Chair, LASI Committee

H. Rutherford Turnbull III

H. Rutherford Turnbull, III
President-Elect

RL:HRT;III:dj

enclosure

AAMD LEGISLATIVE GOALS--1985

The following Legislative Goals for 1985 have been developed by the Legislative and Social Issues (LASI) Committee to guide the Elected Officers, Council and staff of the American Association on Mental Deficiency (AAMD) in taking action in the name of AAMD on Federal legislative and regulatory issues affecting persons who are mentally retarded or otherwise developmentally disabled. In addition, this Goals Document is to serve as a means of communication within AAMD to provide guidance to the Regions, Chapters and Units. Furthermore, it provides information to other organizations and individuals regarding the position of AAMD.

I. CONSTITUTIONAL AND CIVIL RIGHTS: The basic rights afforded to all individuals in this country must be interpreted to apply to persons who are mentally retarded or otherwise developmentally disabled. AAMD resists any attempts to limit the rights of persons with disabilities and supports maintenance and expansion of opportunities for persons who are mentally retarded or otherwise developmentally disabled to live as fully-participating members of society. AAMD seeks continued promotion of equal access to all services and supports legislation prohibiting discrimination in various areas including, but not limited to, housing, zoning, medical care, economic programs, education, and habilitation. AAMD supports legislation to protect the civil rights of all mentally handicapped people in all federally assisted programs and therefore overturn the loss sustained in the Grove City College case.

A. Education for All Handicapped Children Act, P.L. 94-142. In view of recent attempts to curtail protections afforded under this Act, AAMD supports assurance of continuation and expansion of the law and implementing regulations so that a free and appropriate education is available to all handicapped children. AAMD supports legislation to provide access to legal advocacy for parents who are pursuing the right of their child to a free and appropriate education.

B. The Rehabilitation Act, Title V, P.L. 93-112. AAMD resists any efforts to limit the prohibition against discrimination on the basis of handicap (Section 506). AAMD supports augmented funding of the Rehabilitation Act and retention of the rights and provisions contained therein. AAMD opposes discrimination against handicapped individuals in the provision of medical care and supplying nutrients during hospitalization. AAMD supports increased Federal aid to the states for vocational rehabilitation services for recipients of Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI) who are mentally retarded or otherwise developmentally disabled.

C. Civil Rights of Institutionalized Persons Act. AAMD supports stronger Federal enforcement and Congressional oversite concerning CRIPA as a vehicle to protect the rights of vulnerable populations residing in institutions.

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D. Enforcement. Discussion of constitutional and civil rights becomes meaningless without means of enforcement. AAMD supports the essential access to legal assistance and the expansion of services such as the Legal Services Corporation, the Protection and Advocacy Systems of the Developmentally Disabled Assistance and Bill of Rights Act, the Client Assistance Program of the Rehabilitation Act, state agencies and other similar mechanisms so that legal assistance becomes a reality for persons who are mentally retarded or otherwise developmentally disabled.

II. DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT: AAMD supports maintaining the integrity to its present components and a technical amendment to allow a state optional service to be funded under the priority services funding mechanisms.

III. RIGHT TO EDUCATION AND HABILITATION: The development of academic and self-help skills and the avoidance of regression in certain areas requires life-long opportunities for education and habilitation services. AAMD supports promotion and expansion of such opportunities, including but not limited to, early intervention programs, school programs, transitional services, post-secondary programs, job training and necessary supportive services. Persons who are mentally retarded or otherwise developmentally disabled have a primary right to education and habilitation which becomes the basis of meaningful participation in all other rights.

IV. RIGHT TO MEDICAL CARE: Recently there has been increased evidence of discrimination against persons who are mentally retarded or otherwise developmentally disabled in the provision of medical care, treatment and nutrients. AAMD passed a resolution in 1981 regarding this right and became one of nine professional and advocacy organizations that signed "Principles of Treatment of Disabled Infants" in support of medical care for disabled persons on a non-discriminatory basis. Consideration of such factors as anticipated or actual limited potential of an individual and present or future lack of available community resources are irrelevant and must not determine the decisions concerning medical care. The individual's medical condition should be the sole focus of the decision. AAMD supports the strong enforcement of the child abuse amendments related to the denial of medical care to disabled infants and if necessary, making explicit section 504 protection of health coverage for children or handicaps.

V. PREVENTION: AAMD supports efforts to prevent mental retardation and other developmental disabilities. It is the position of AAMD that psycho-social prevention activities and bio-medical prevention activities are of equal import. Expansion of support is to be sought from various sources, including but not limited to, the Maternal and Child Health Program, the Department of Education, Special Project Developmental Disabilities Funds, and R.S.A.

A. Psycho-social Prevention Activities: AAMD seeks increased levels of support for parent training for high-risk parents (e.g.; teenage mothers), accident prevention (including mandatory seat belt laws),

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WISCONSIN
COALITION FOR
ADVOCACY

May 3, 1985

The Honorable Lowell Weicker
United States Subcommittee on the Handicapped
113 Hart Senate Office Bldg
Washington, D.C. 20510

Dear Senator Weicker:

Thank you for requesting my comments on the issue of attorney fees for parents who are successful in 94-142 cases.

Based on my experience in Wisconsin, I believe that allowing attorney fees in appropriate cases would advance the fundamental purpose of the Act, namely to ensure the development of quality programs throughout the state which prepare children with serious mental and physical impairments for independent, fruitful lives.

This purpose would be accomplished by two important results: increasing the likelihood that appropriate parental demands will gain respect before parents institute legal process, thus improving the effectiveness of parental advocacy; and by creating an atmosphere where ordinary lawyers will acquire the skills necessary to be effective in special education cases when legal process does become necessary.

Improve Parental Advocacy

Some parents, like all of us, become discouraged when the odds against them appear overwhelming. The fact that we have the programs that now exist is a testament to the indomitable parents who would not give up. But if we are to accomplish the public purpose of widespread quality services for children with disabilities, we must rely on ordinary people as well as heroes. And, in my experience, the ordinary people, and even many of the heroes, will accept a mediocre or substandard program in the face of steadfast opposition by school administrators, and the knowledge that it will cost thousands, even tens of thousands of their own dollars to bring about change.

This disillusionment cuts the heart out of the law. Without the energy and committment of parents, the tendency of school districts to retrench on the more expensive programs for severely handicapped pupils is unchecked, and the impetus for improvement is lost.

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I do not mean to say that parents need attorneys in the first instance to help them press for better quality programs. The opposite is probably true. But what many parents have told me is that they've tried and tried to get something appropriate for their child by having meetings with school officials and been ignored. They think, and I agree, that those early meetings would be more fruitful if the district was not so confident that it could cavalierly ignore the parents' requests without fear of later adversarial action.

The ability of parents to obtain attorney fees if they are successful in ultimate legal action will bring some balance and mutual respect to the penultimate negotiations.

Presently, as I'm sure many parents will tell you, a district can make the decision to spend, say, ten thousand for attorneys fees to put off instituting a twenty thousand dollar program while it pursues time-consuming appeals. This decision becomes even easier if the attorney fees for the district are covered by insurance.

To answer your question, Senator Weicker, I believe the lack of an opportunity to recover attorney fees has caused many parents in Wisconsin to give up when blocked by school districts at a pre-hearing stage. This not only hurts the children and the parents, but also our state, which is then faced with the increased cost of care for adults with significant handicaps who will not have been taught those skills for independence they might otherwise have acquired.

Improve Legal Advocacy

The intent of the Act is that where negotiation and organized pressure by parents cannot bring about appropriate programs, this goal be accomplished by individual legal actions on behalf of particular children.

Congress made the choice, wisely I believe, that the purposes of the act would best be reached by point to point rather than mass advocacy. That way the unique gifts and needs of each child will not be ignored.

Unfortunately, this plan has had one serious drawback in its implementation. Many private attorneys simply lack the necessary background information to step in and effectively and efficiently conduct actions on behalf of children in special education cases. Nothing in the average private practioner's range of activities generalizes well enough to support the tactics needed to conduct due process hearings and court reviews.

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The fundamental role of the IEP, the prospective nature of the action, the content of evaluations, and even the basic goals of special educational programming are among the topics to be mastered before an attorney can do a good job.

If a parent, lacking an alternative, hires an inexperienced attorney, the choice is whether to pay for part of the attorney's education in these areas, or hope for the best and let their counsel wing it.

Some attorneys have engaged in a sufficient volume of hearings to become skillful. Many of these represent school districts. A few are parents' lawyers, who, by accepting cases from large regions can find enough parents with the resources to pay for quality representation. Some of the protection and advocacy agencies, like the one where I am employed, have dedicated significant portions of their staff attorneys' time to special education cases (leaving less time available for other issues such as those relating to adults with disabilities, institutional conditions, vocational rights, etc). But a single attorney located in one city in a large state will only be able to do a small number of cases state-wide. As a result I, and many of my colleagues at other P & A's have had to turn down many requests for representation.

The availability of attorney's fees in some special education cases will encourage more private practioners to learn about special education, take cases with only nominal retainers to build expertise and participate in enough hearings so that they can conduct them efficiently.

It's easy for a lawyer in a public interest agency to criticize private counsel for not doing special education cases on a pro bono basis. But the fact is that special education cases are so time-consuming that few lawyers can afford to do them without charge. Where a divorce, even with child custody issues might take twenty or thirty hours over a six month period, a special education appeal can easily require hundreds of hours over a period of years.

(Incidently, I suspect the duration of appeals will be reduced if the costs of delay are more equally shared by schools and parents.)

Thus, the main goal of the law would also be furthered by awarding attorneys' fees in certain cases. Where legal action in individual cases is needed to build good programs, efficient and skilled private counsel will be available to represent the needs of the children affected.

I hope you and your committee find this information helpful. Feel free to contact me or my agency if you need clarification or further details.

Sincerely,

John Franz
Staff Attorney

MAY 28 1985

THE GOVERNOR'S COMMISSION ON ADVOCACY

May 21, 1985

Senator Lowell Weicker, Jr.
Chairman
Subcommittee on the Handicapped
United States Senate
Washington, D.C. 20510

RE: S.415 - The Handicapped Children's Protection Act of 1985.

Dear Senator:

Thank you for your kind letter of May 8, 1985 and its invitation to provide written testimony on the referenced legislation.

Background

I am the Executive Director of Florida's Protection and Advocacy agency established under the Developmental Disabilities Assistance and Bill of Rights Act. I have served in this capacity since the agency was established in 1977. I am also the Vice-chairman of the Florida Bar's Committee on the Rights of the Disabled and a Member of the Editorial Advisory Board of the American Bar Association's Mental Disability Law Reporter. I have been a practicing attorney in Florida for over 13 years. As is common in other States, special education issues comprise nearly 50% of the case load of our Protection and Advocacy Program. I have represented directly or supervised the representation of numerous parents in negotiations, due process hearings and federal court cases under Public Law 94-142, The Education for Handicapped Children Act.

I am of the strong opinion that the meaningful implementation of Public Law 94-142 necessitates that parents be afforded the right to petition courts for an award of reasonable attorneys' fees and costs when they prevail in litigation brought under the Act. This must include at least an opportunity to request costs and fees incurred in bringing administrative due process hearings.

Trend to More Legalistic Proceedings

It is important to note at the outset a significant trend with respect to educational due process hearings. These

Office of the Governor, The Capitol, Tallahassee, Florida 32301-8047 / Telephone (904) 488-9071, Toll Free 1-800-342-0823 (TDD or Voice)

hearings are becoming increasingly formal with an emphasis on procedural due process conducted by law trained hearing officers. In Florida special education due process hearings are conducted by hearing officers assigned from the State Division of Administrative Hearings. These are full-time hearing officers, all of whom are lawyers. They conduct a wide variety of hearings brought under Florida's Administrative Procedures Act. They do not make decisions based upon their own estimation of what is educationally appropriate, but rather as a judge based upon the factual evidence presented before them and the persuasiveness of legal arguments. Appeals to their special education decisions are either to the State's District Courts of Appeal or to a U.S. Federal District Court.

The trend in law trained hearing officers is reinforced by recent Federal Court decisions regarding the impartiality of educational due process hearing officers. Virtually anyone with a "professional (i.e. educational) interest" in the outcome of the proceeding has been disqualified. In Mason v. Teague, the U.S. Court of Appeals for the Eleventh Circuit held that even employees of local school systems not attended by the child in question and university personnel involved in the "formulation of State policies in educating handicapped children" lack the necessary objectivity to qualify as impartial hearing officers. It seems to me inevitable in view of the increasingly narrow field from which such hearing officers may now be drawn, other States, like Florida, will turn to law trained officers and consequently more court-like proceedings.

In my view this is not an objectionable trend. It is entirely consistent with broader trends in the development of both juvenile and administrative law. While all of us desire enlightened, impartial, nonadversial resolution to conflicts between parents of handicapped children and local school districts, this can not be accomplished at the expense of procedural due process. Nearly two decades ago the U.S. Supreme Court crossed this threshold in connection with juvenile justice proceedings. In re Gault returned the supremacy of legality over informality in juvenile proceedings. For better or worse it is the best way we know to limit abuses of governmental discretion.

High Costs of Litigation

Unfortunately, legal process is also highly technical, costly, time consuming and largely inaccessible to the average family. The extent of discovery and expert testimony that can be utilized in a typical educational due process hearing can rival a medical malpractice case. The overwhelming mass of

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State and Federal regulations and judicial case law rivals the anti-trust and securities fields. The Education for the Handicapped Law Report, a legal reference service concentrating exclusively on 94-142 issues, fills five large loose-leaf binders annually. My informal reading of the cases over the last seven or eight years suggests considerably more than half of the decisions reaching Federal Courts result in favor of parents.

The astounding fact is how few parents avail themselves of these procedures. In Florida, for example, during the last year there were only 35 requests for due process hearings statewide. This number is due at least in part to the high cost of litigation. The bill to transcribe a single's day's deposition in a recent case I handled was nearly $1,000.00. Expert witnesses cost at a minimum a $150 per day. Handling a single due process hearing can easily cost my office in excess of $5,000 exclusive of travel costs or attorney's fees. Federal litigation, of course, multiplies these costs several times over. The average parent if they can manage to scrape together the resources for the hearing could rarely pursue an appeal. Our office by necessity must be selective in the cases it handles and can not represent all meritorious claims brought to us by parents of handicapped children.

The recent U.S. Supreme Court decision in Burlington School Committee v. Department of Education of the Commonwealth of Massachusetts underscores the recognition that final decisions on the merits of an IEP challenged by parents will "in most instances, come a year or more after the school term covered by the IEP has passed." The long duration of these proceedings led the Court to find a right to reimbursement of tuition fees for parents prevailing under 94-142. In Smith v. Robinson, without express legislative intent, the Court was unable to find a comparable right to attorneys' fees awards. I read Burlington as an invitation to Congress to correct this inadvertent wrong.

Unequal Contest

Many have argued that S.415 will "restore the balance between parents and educational agencies". I cannot emphasize how imbalanced the present relationship is at the local school district level. In Florida for example, our local school boards are extremely resistant to external involvement. This does not mean that we do not have progressive school districts. We do and many are making great strides in the education of handicapped children. Problems emerge only when a parent elects to challenge a school system's judgement about their child.

All school boards in Florida retain as their attorneys the largest and most politically influential law firms in their communities. When a parent requests a due process hearing the matter is immediately placed in the law firms hands. With the school system controlling the educational expertise and the law firm, like Brer Rabbit, at home in the legal briar patch, the parent without a lawyer hardly stands a chance.

Conclusion

Parental participation and procedural due process are the hallmarks of 94-142. Without the access to legal counsel that attorneys' fees awards can assure these two essential elements are lost to most parents of handicapped children.

Respectfully submitted,

Jonathan P. Rossman

JONATHAN P. ROSSMAN
Executive Director

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QUESTIONS FROM SEN. NICKLES DIRECTED TO MARY TATRO

1. WHO WAS YOUR LEGAL REPRESENTATIVE DURINGYOUR ADMINISTRATIVE AND LEGAL PROCEEDINGS?

Our legal representative was Craig Enoch, an attorney from Dallas. He represented us up until we had to go back to court the second time for a sanction motion against the school district. Mr. Enoch represented us thru the Due Process, the State Appeals, the 5th Circuit Court the first time, the remand to Federal District Court in Dallas, and the first contempt of court motion before the Federal District Court. Mr. Enoch also was present at several IEP meetings. This was necessary because the school district had legal council. For instance at one IEP meeting, set for 7:30 a.m. we arrived only to find the attorney for the school district present. We had to call Craig Enoch at home at 7:30 a.m. and ask him to come to the school. He did so that we would have legal council in view of the fact that the district had their attorney in attendance.

During the time our case was going thru the many courts, Governor Clements appointed Craig Enoch 101st Civil District Court Judge (Dallas, Texas). At that time we had a petition for sanction before the court on a second contempt motion (both times the school district had stopped doing clean intermittent catheterization even tho they had been issued a court order to provide same). At that time Judge Enochs partner, Charles Fuquay represented us in the court on the contempt issue. Charles was not familiar with school law and it was then necessary to try and locate an attorney who was familiar with PL94.142 and .504 and the school laws. Judge Enoch contacted Advocacy, Inc. and they agreed to help us at that point. Advocacy, Inc. is located in Austin, Texas (four hour drive from Dallas).

2. IF IT WAS NOT THE TEXAS PROTECTION AND ADVOCACY AGENCY ESTABLISHED BY THE FEDERAL GOVERNMENT, WHY NOT?

First of all, we were never notified by anyone that there was "free" legal aid, nor that Advocacy, Inc. was set up to handle this for parents. However, I talked with Advocacy, Inc. this morning in regards to "who", "when" and etc. they handle cases. I was advised by the Attorney that even had we contacted them they do not know if they would have been able to handle the case in the beginning. There are 396,000 handicapped children in the State of Texas. Advocacy only has four attorneys. The reason they took over after we had been thru a fourth of the process was because the case would impact a large number of children (win or lose) and Amber is developmentally delayed. We were NEVER TOLD BY THE SCHOOL DISTRICT that there was legal advise available. The school districts sometimes never even give out the "little grey" rights booklet and in fact even now when they do, sometimes it is after you have had your meetings. Nevertheless, we were never told we could get help and it is very doubtful we could have gotten assistance from Advocacy at this point. I was advised today that they always encouraged local attorneys when help was available. The agency

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was set up to protect the rights of disabled children but it is impossible for Advocacy to handle all cases. Reed Martin is the attorney I talked with this morning and he also advised this morning that last year in the State of Texas there were only 12 hearings in the entire State. This was due to the Smith vs. Robinson decision and that because of this decision parents can not hire attorneys to represent them and their disabled children. The problems have not gone away but parents are unable to defend the rights of the children due to the Smith vs. Robinson case. Advocacy, Inc. can only take a limited number of cases. Advocacy tries to work with the schools and the state prior to any litigation but the schools know the parents can not hire attorneys due to the decision and consequently work toward the parents forfeiting the rights of their children when they can not acquire the legal assistance they need to battle the school districts.

3. WHAT WAS THE FINANCIAL IMPACT OF THE LEGAL COSTS OF YOUR FAMILY?

The impact of this case was more than legal costs. There is also a question as to health impairments due to the stress on the family. However, I would like to answer the costs factor first.

We were fortunate in that both of us work. However we would like to be able to use our funds for such things as medical care, housing, and the normal things a family has to have. My husband paid for the due process costs up-front out of our funds. However, when the State Board illegally overturned the hearing officer and the commissioner we had to make a $5,000 down payment to the attorney. This time we had to borrow money. When the case went back to the court for the second contempt motion, we had to again borrow $2,000 just to keep the case going. At this time we still owe the attorney the balance of the award from the Court, around $28,000. Even two working people can't afford these kind of fees, especially if they have the responsibility of a disabled youngster. This legal battle also took all of my vacation time as I used a day at a time as I needed it so I could be in court, at the IEP meetings, or whatever time it took. During all of this our child also had five operations, three of them major. I had never had any blood pressure problems, and in fact there is no history of high blood pressure in my family. I am now on medication for extremely high blood pressure which my doctors feel was brought on by the stress caused by the school district. This also had a negative affect on my performance at work, especially when the school is calling or walking into the office. There are some things that money can't buy, one of them is your health and emotional state. I truly suffered during this case.

4. IF YOUR LEGAL REPRESENTATIVE WAS PROVIDED BY THE TEXAS P&A, DID THEIR SERVICES COST YOU ANYTHING?

The services provided by Advocacy, Inc. was not charged to us.

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QUESTIONS FROM SEN. STAFFORD TO MARY TATRO

1. As a parent, do you feel that you could have represented Amber at the Administrative Due Process Hearing without legal Representation?

NO!!!! The entire Due Process Hearing we went thru was stictly set up as a Court. The Due Process Officer acted as the Judge, and in fact was addressed as "Your Honor", the evidence was presented in accordance with law, the testimony was taken by a court reporter and the entire hearing was set up as a court of law. I knew nothing of the law at that time except that what we were asking for was being done in other school districts and for somereason the Irving Independent School District was refusing Amber the same things others were already doing.

This proceeding are set up in this manner in the entire State of Texas. Unless a parent is a lawyer they would not stand a chance. One of the things you have to submit is written documents to the hearing officer. I certanly could not have submitted suitable transcripts to anyone and we would have certainly lost. I do legal work in my position as a surety bond specialists, however, I could not have done the transcripts necessary for this due process.

This testimony lasted five hours before the hearing officer with witness' called from both sides, including the Dr. for Amber. The school had their witnesses, including the R.N. in charge of School Health Programs from the Irving ISD., the Physician,who by the way was also a member of the School Board, and on and on.

As a matter of record, I have been told by some parents who wanted to go to due process that they would have to furnish $5,000 up front just to get started. And that was just for the due process hearing.

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RESPONSES BY EDWIN W. MARTIN TO SUPPLEMENT QUESTIONS

Response of Martin to Senator Kerry:

It has been my observation, Senator, that the responsibility for compliance monitoring and related activities should involve both the Office of Civil Rights, and the Office of Special Education Programs. In 1976 and again in 1980, I played a part in the development of inter-agency agreements concerning monitoring and compliance activities between these two agencies or their predecessors.

The 1980 agreement was quite detailed and carefully worked through with considerable advice from the disability community, education groups, etc. While I understand that the Office of Civil Rights has continued discrete compliance reviews (I do not have available to me comparative figures for recent years), it is my understanding that a number of features of the agreement which were felt to be critical to effective monitoring and compliance were not being observed as recently as six months ago. Hearings held August 1, 1984 by the House Select Education Subcommittee provide information in this regard presented in considerable detail by the Coalition for Citizens with Developmental Disabilities.

I am pleased to learn that the Assistant Secretary for Special Education and Rehabilitation, Mrs. Madeline Will, has directed the Office of Special Education Programs to develop a new and more vigorous approach to compliance monitoring and those efforts are now underway. As difficult and sometimes controversial, as compliance activities are - you will be criticized on both sides - it is clear that responsible monitoring is necessary to bring about changes of the kinds envisioned by this law.

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Response to Senator Stafford:

I was pleased to have the opportunity to work with you, Senator Stafford, and your colleagues in the drafting of P.L. 94-142, and I have greatly admired your effective leadership in the House and the Senate on matters affecting the lives of people with disabilities, as well as I might add all Americans, as we are affected by our Environment about which you have expressed such strong concerns.

I don't believe the concerns are valid as expressed by some spokespersons for school districts that the proposed legislation will spark adversity between parents and school personnel which would harm parent participation under the Act. First, as I mentioned in my statement, the record of the implementation of the Act is now well established over a number of years, and there are very few hearings, less than a fraction of a fraction of 1%, and only a tiny percentage of these go to court. When legal fee relief was available before Smith V. Robinson, the number of hearings was still quite small and in fact, declining. It should be noted that parents would still have to go through this terribly painful appeal and/or judicial process and then would have to have their position supported to be eligible for expenses. The risk of failure certainly deters frivolous actions. There is nothing to gain for parents here, only the opportunity to break even at best and only when they are judged correct.

When the bill was being considered by the Congress, I believe all parties felt it was critical that the parents have sufficient impact, through the hearings process to provide local level solutions to problems. This process, even when it led to the courts in a fraction of cases, was a much-to-be-desired alternative to a federal Executive branch review and decision-making process - which might have been an alternative to assure the appropriate expenditure of federal funds.

As you know, the school systems select the hearing officers, are represented at hearings by trained psychologists and educators and have tax-paid attorneys available. Parents need some balancing resources to even begin to confront this establishment, not as troublemakers, but in the exercise of this legitimate role as caretakers for their children.

119 Glendale Road
Sharon, MA 02067
May 29, 1985

The Hon. Senator Robert T. Stafford
The United States Senate

Dear Senator Stafford:

This is in answer to your question forwarded to me by Senator Weicker after the May 16 hearing. I am returning this letter via Subcommittee staff member Dr. Karl White.

To those who fear that availability of attorney's fees will encourage parents to go to court more often I offer these comments:

Because of our desperation for a decent education for Danny, recovery of attorney's fees was far from the top of our list of priorities. Our backs were against the wall and we really had no choice but to proceed.

The notion that parents would base a fundamental decision on whether to proceed in a grueling process such as this, based on the hope of future recovery of attorney's fees, is from my point of view very remote. Why would any parents subject themselves to the nerve-wracking judicial appeals process - in our case involving injunctions, a remand, calling new witnesses, argument over admissibility of evidence, facing our neighbors in town, and further appeal up the judicial ladder - all this just to recover attorney's fees?

Even those parents I know who did not have to worry as much about money approach this grueling encounter with a great deal of trepidation. All of us are sufficiently occupied with the everyday problems of raising our other "normal" children in a fast age of violence and drugs.

On the contrary, the prospect of a more balanced distribution of leverage, such as recovery of fees by prevailing parents, might discourage the school districts from routinely stonewalling and intimidating parents from seeking an appropriate education for deserving youngsters. The result could well decrease litigation and increase out-of-court accommodation, bringing us closer to the goal of a cooperative process rather than confrontation.

With respect and appreciation for the efforts you are devoting to this problem,

Edward Abrahamson

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119 Glendale Road
Sharon, MA 02067
May 29, 1985

The Hon. Senator Don Nickles
The United States Senate

Dear Senator Nickles:

This is in answer to your questions forwarded to me by Senator Weicker in followup of the May 16 hearing. I am returning this letter via Subcommittee staff member Dr. Karl White.

- Yes, we had a private attorney prior to my losing my job.

- Yes, we used our private attorney at both the administrative and judicial (district court) levels.

- Our private attorney plus expert witnesses and court costs, etc. cost us over $10,000, before the School Committee decided to appeal the case to the U.S. Court of Appeals.

- We were aware of various organizations, including the Developmental Disabilities Law Center (DDLC is the Mass. P&A), which make legal assistance available to the needy. At the time this battle began there were many cases in the P&A backlog with people who were needier than we, and P&A's understandable income criteria made us ineligible. Since we were ineligible, we then had to search for the right kind of attorney with experience in this specialized case law as it was unfolding. Our fears turned out to be justified because the School Committee hired a specialist in this field themselves - not just their town counsel on retainer.

  After losing my job and because of a long list of cases awaiting assistance from the Mass. P&A, the Massachusetts Advocacy Center (which is not the P&A in Massachusetts but a private, non-profit organization), decided to continue the case on behalf of Danny through the federal appeals process.

Senator Nickles, please try to understand that as parents we did not undertake this unpleasant burden happily. We were forced against the wall. To anyone really familiar with the case, our son was just not going to be even minimally educated in a 10-month 9:00 a.m. to 2:00 p.m. day program. The School Committee's expert

witnesses based their case on a fleeting evaluation of 2 or 3 hours duration. Our own expert, the noted Dr. Paul Touchette, observed Danny consistently for 6 months. That is what convinced the federal judge. It made no impression, however, on a School Committee with other priorities; nor on a captive administrative hearing officer who is employed by the state department of education. But P.L. 94-142 is now the Law.

If you are truly trying to come to grips with a judgment on whether to support Senate 415, my final plea is that you ask yourself this common sense question:

Would parents who have to cope with sundry medical, support, and other educational problems (sometimes simultaneously on behalf of their other "normal" children) be in their right minds to go to court if there wasn't a darned good reason? Who needs that extra agony?

At least give us a little more balance with those heavy establishments if we prevail in court - just as many other civil rights litigants. It might just give the school districts incentive to negotiate a decent educational plan out of court before playing a game of "chicken" with us for a period of those vital years while a child is supposed to be educated.

With respect and appreciation for the time you are devoting to this problem,

Edward Abrahamson

RESPONSE TO QUESTIONS FROM SENATOR NICKLES TO WILLIAM DUSSAULT

1) Question: Is your practice devoted primarily to special education cases?

Response: My practice is devoted to representation of persons with disabilities. A substantial portion of that practice is involved in special education matters.

2) Question: When representing parents in an administrative hearing or in litigation, what do you charge by the billable hour?

Response: My billable rate varies from $75.00 to $100.00 per hour, depending upon the difficulty of the case and the parents' ability to pay. Opposing counsel generally hired by the school district charge from $100.00 to $150.00 per hour for the same services.

3) Question: About how many hours of attorneys' time would be involved in the cases of Mrs. Tatro and Mr. Abrahamson?

Response: I would be able to provide only a rough estimate of the time involved. I would guess that Mrs. Tatro's case involved in excess of 300 hours. My estimate of the time involved in the Abrahamson case would be between 150 and 200 hours.

4) Question: How much charitable work do you do in this field per year?

Response: I average a minimum of five hours per week working either on a pro bono basis for individual parents, presenting information on a no-charge basis to community parent and school groups, and representing non-profit organizations at no charge. Total annual time devoted to special education or handicapped related matters would exceed 300 hours.

5) Question: There were 1,462 special education cases which were heard at the first level last year. If families had attorneys representing them at these proceedings, what would be the average legal cost for such representation?

Response: It is my experience that most first level cases arise due to a failure of the pre-hearing negotiation process. If an attorney were involved in the first level hearing, I would anticipate that a competent attorney should spend an average of ten to fifteen hours total in preparation and presentation. At an average fee of $75.00 per hour, the fee should range from $750.00 to $1,125.00 per hearing.

6) Question: There were 292 appeals of the decisions in the 1,462 cases which occurred last year. What would be the cost of the appeal of these cases (a ballpark figure is fine)?

Response: Appeal to a second level appeal process, usually to the offices of state superintendant of public instruction, do not generally involve as much witness preparation or direct trial presentation. The principal obligation is the preparation of an appropriate supporting brief. Given an attorney who knows the subject area, I would anticipate that preparation and presentation of the material should take an average of an additional ten to fifteen hours at approximately the same cost involved in the first level hearings. It has been my experience that the second level hearings are largely an exhaustion phase. Several states are now doing away with that requirement.

7) Question: Beyond those appeals, there are 67 cases which were litigated last year. What would be the cost of taking a special education case through the court system?

Response: It is substantially more expensive to bring the case to the state trial court or the Federal district court. The Federal Court Rules of pleading and evidence are far more complicated. In the event a de novo hearing is required, the case is essentially retried in toto. One would expect a minimum entry level time involvement of 25 hours if any substantial issues are involved. Time requirements would escalate rapidly. It would not be unusual to see a Federal District Court case require 50 to 75 hours in preparation and presentation. Subsequent appeals to both the circuit and Supreme Court could easily take 50 to 100 hours each. Accordingly, it would not be unusual to see fees incurred through a circuit court appeal or a petition for certiorari to the United States Supreme Court in the area of $100,000.00 and above.

RESPONSE TO QUESTION FROM SENATOR STAFFORD TO WILLIAM DUSSAULT

Question: Mr. Dussault, it is my belief that making attorney's fees available through the courts would encourage earlier resolution of disputes between parents and local school districts. Critics of this legislation believe that providing fees would encourage attorneys to extend the process rather than resolving the issue at the earliest possible date.

What is your opinion on this matter?

Response: It is unequivocally my position that attorneys who are knowledgeable in special education matters and are actively representing their clients will seek to resolve a dispute at the earliest possible stage in the dispute resolution process. The primary reason for this is that the child with the disability has only a specific limited amount of time to spend in publicly funded special education. The longer the time that is spent in conflict over the specific aspects of a program, the less time the student is going to have in an appropriate program. Most parents realize how important those years of publicly funded education are and are most anxious to resolve the disputes as quickly as possible so that their children may move into an appropriate program. The statutes "status quo" provision requiring that the child stay in the disputed placement during the pendency of the proceedings act as a powerful disincentive for the parents.

Additional Comments of
E. Richard Larson
on behalf of the
American Civil Liberties Union

on S. 415, the
Handicapped Children's Protection Act

before the
Subcommittee on the Handicapped
Committee on Labor and Human Resources
United States Senate

May 31, 1985

Subsequent to the hearing held on May 16, 1985 on the Handicapped Children's Protection Act of 1985, I received through Subcommittee Chairman Lowell Weicker, Jr., an additional question posed to me by Senator Robert T. Stafford. That question is as follows:

> Mr. Larson, since the Supreme Court ruled in Smith v. Robinson, we have been told that parents will have a difficult time finding legal representation in special education suits. Can you speak to this co-called "chilling effect" on the availability of private attorneys to represent handicapped children and their families?

In response to Senator Stafford's thoughtful question, I have no doubt that Smith v. Robinson has had (and will continue to have, unless Congress acts to overrule Smith v. Robinson) an overwhelming "chilling effect" on the availability of private attorneys to represent handicapped children and their families. This conclusion flows from four interrelated realities, each of which is addressed hereafter: (1) Smith v. Robinson barred fee

awards in actions and proceedings involving handicapped children; (2) fee awards provide a necessary financial carrot to attract private practitioners to provide legal representation to civil rights plaintiffs in general; (3) fee awards are even more necessary to attract private practitioners to represent handicapped children in special education actions and proceedings; and therefore (4) the effect of Smith v. Robinson is the denial to handicapped children and their families of the legal representation which is necessary to assert their rights.

1. **The Supreme Court in Smith v. Robinson Barred Fee Awards in Actions and Proceedings Involving Handicapped Children**

There is, at the outset, no question about what the Supreme Court did in Smith v. Robinson. It held, with regard to handicapped children covered by the Education for All Handicapped Children Act [the "EAHCA"], Pub. L. No. 94-142, that there is no availability of court-awarded attorneys fees for lawyers who successfully represent handicapped children and their families.

The Court in Smith v. Robinson reached this conclusion not only with regard to actions and proceedings to enforce the EAHCA. The Court also went much further. It held that handicapped children covered by the EAHCA have no legal rights under § 504 of the Rehabilitation Act, and that there accordingly is no availability of fees under § 505 of the Rehabilitation Act (as amended in 1978). And the Court also held that such handicapped children have no constitutional rights which can be asserted through 42 U.S.C. § 1983, and that there accordingly is no availability of fees under 42 U.S.C. § 1988 (as amended in 1976).

Prior to Smith v. Robinson, the courts had routinely awarded fees to attorneys who successfully represented handicapped children and their families. The Supreme Court, however, totally removed the financial incentive which forms the predicate for private legal representation.

2. Fee Awards Provide a Necessary Financial Carrot to Attract Private Practioners to Provide Legal Representation to Civil Rights Plaintiffs in General

In authorizing fee awards for counsel who are successful in enforcing civil and constitutional rights, Congress has repeatedly recognized that the financial carrot of fee awards is absolutely necessary to attract private lawyers to represent civil rights plaintiffs. This is because civil rights plaintiffs ordinarily cannot afford to pay a lawyer, much less to pay legal expenses and court costs; and because civil rights cases ordinarily involve primarily if not only equitable relief, thereby making contingency fee agreements unavailable. Coupled with these realities is the fact that private lawyers who must support themselves and their families are generally unwilling to provide legal representation unless there is a high probably of payment through legal fees.

Although each of the foregoing facts is self-evident, they also are a matter of record through the legislative history accompanying most civil rights fee statutes, and particularly through the legislative history accompanying the omnibus Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Because of the importance of the congressional findings accompa-

nying the 1976 Fees Act, it is instructive to quote from at least several of the findings set forth in the accompanying Senate Report, S. Rep. No. 94-1011, 94th Cong., 2d Sess. (1976) [the "Senate Report"], and set forth in the accompanying House Report, H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. (1976) [the "House Report"].

First, there is no doubt about civil rights plaintiffs' general inability to pay lawyers. "In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer." Senate Report at 2. As a result: "Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts." House Report at 1. In other words, "fee awards [are] an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these [civil rights] laws contain." Senate Report at 2.

Second, there similarly is no doubt that in most civil rights cases "only injunctive relief is sought" and that fee awards thus are necessary "to promote the enforcement of the Federal civil rights acts, as Congress intended." House Report at 9. Stated otherwise: "'If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.'" Senate Report at 3 (citation omitted); see also House Report at 6. Accordingly, "fees are an integral part of the remedy necessary

to achieve compliance with our statutory policies." Senate Report at 3.

Finally, there also is no question that the unavailability of fees makes representation by private lawyers unavailable.1/ In "hearings" before the House, "the testimony indicated that civil rights litigants were suffering very severe hardships" because of the unavailability of counsel. House Report at 2. In fact, "private lawyers were refusing to take certain types of civil rights cases" without the possibility of fee awards. House Report at 3. Accordingly, as explained in the Senate Report at 5: "In several hearings held over a period of years, the [Senate] Committee has found that fee awards are essential if the Federal statutes to which [the 1976 Fees Act] applies are to be fully enforced."

In sum, Congress found that it must "insure that reasonable fees are awarded to attract competent counsel in cases involving civil and constitutional rights." House Report at 9. As similarly recognized in the Senate Report at 6: "If our civil rights laws are not to become mere hollow pronouncements which the

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1. The 1976 Fees Act was designed to overrule, and did overrule, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), in which the Supreme Court held that fees were ordinarily unavailable absent Congress' enactment of a fee-shifting statute. As explained in the House Report at 2-3: "civil rights litigants were suffering very severe hardships because of the Alyeska decision," in fact the decision had a "devasting impact . . . on litigation in the civil rights area," indeed "[t]housands of dollars in fees were automatically lost in the immediate wake of the decision," all with the result that "private lawyers were [now] refusing to take certain types of civil rights cases." Additional support for these findings is set forth in Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America, at 312-23 (1976).

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average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in these cases."

Although additional testimony is unnecessary to augment what Congress has already found, there simply is no question that the findings of the Ninety-Fourth Congress in 1976 are fully applicable today. As a result of my fifteen years as a practicing civil rights lawyer, and as a result of my expertise and consulting on the law of court awarded attorneys fees, I can confidently state that the financial incentive of fee awards is absolutely essential to attract competent counsel to represent civil rights plaintiffs. Today, just as Congress found in 1976, virtually all victims of civil rights violations are unable to pay legal fees or even to pay legal expenses and court costs so as to retain private counsel; most civil rights cases continue to be cases where equitable relief is primarily sought, only sought, or only available; and competent private counsel continue to be unavailable to provide legal representation without a fee arrangement or at least without the probability of court awarded fees.

As to the latter point, it may be useful to emphasize that although fee statutes provide a necessary incentive to private representation, they do not guarantee private representation because of the fact that fee statutes do not fully balance the resources of plaintiffs' counsel vs. defense counsel. First, plaintiffs' counsel are entitled to fees only when they win; whereas defense counsel (whether salaried government or school board lawyers, or privately retained lawyers) are paid not only when they win but also when they lose. Second, successful plain-

tiffs' counsel experience severe cash flow problems since they ordinarily recover fee awards only after they succeed in administrative proceedings, in trial, and ultimately on appeal (all of which often extends over a period of many years); whereas losing defense counsel are paid monthly if not biweekly. Finally, the amount of fees actually recoverable by successful plaintiffs' counsel either through settlement or through court order ordinarily is substantially less than a fully billable hours-times-rates fee; whereas losing defense counsel are ordinarily fully paid for all time expended.

Because of these considerable financial disparities between plaintiffs' counsel and defense counsel, most lawyers prefer to be in the shoes of the latter rather than of plaintiffs' counsel.[2/] As should be apparent, although fee statutes thus do not actually equalize either fees or legal resources, fee statutes are an absolute necessity to attracting at least some competent counsel to represent civil rights plaintiffs.

3. Fee Awards Are Even More Necessary to Attract Private Practioners to Represent Handicapped Children in Special Education Actions and Proceedings

It can easily be said that just as fee awards are necessary to attract private practitioners to represent those whose civil

2. Not only is this an obvious (and an economically sound) preference, but it is also a fact in my experience that many former plaintiffs' lawyers are now also representing defendants if for no other reason than to get paid, i.e., to put bread on the table and otherwise to earn a living. See also, e.g., Hearings on S. 585 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 44 (1982) (testimony of Fletcher Farrington).

rights have been violated, so too are fee awards equally necessary to attract private practitioners to represent handicapped children in special education actions and proceedings. In fact, it is not just equally necessary; it is more so. This flows from the fact that parents of handicapped children incur heavier financial obligations than the average person; from the fact that special education actions or proceedings ordinarily involve considerably higher than usual legal expenses; and from the fact that special education law is complex and not particularly attractive to many plaintiffs' lawyers.

First, the parents of handicapped children unquestionably incur financial obligations far beyond that experienced by other parents. Among these additional obligations are medical expenses, transportation expenses, home care expenses, and home alteration and improvement expenses, to name just a few.[1] What these additional financial obligations mean, in a practical sense, is that parents of handicapped children ordinarily have no residual resources to pay an attorney a small retainer, necessary legal expenses, or even court costs.

Second, despite the parents' greater inability to pay, the cruel fact of the matter is that special education actions and

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1. Even apart from this financial reality, parents whose children are classified as handicapped are often on the bottom of the socio-economic scale, and in fact are disproportionately members of racial minorities. This latter reality flows from the discriminatory fact that black children are three times more likely than white children to be enrolled in classes for the educably mentally retarded, and one-and-a-half times more likely to be enrolled in trainable mentally retarded programs. See, e.g., Office of Civil Rights, Department of Education, Elementary and Secondary School Civil Rights Survey (1980).

proceedings are often more expensive than other civil rights actions or proceedings. This greater expense -- facing the parents and their would-be lawyers -- emanates from the early need to retain doctors and other experts to testify (usually in opposition to the school boards' doctors and other retained and paid experts) about the nature of the disabilities and the educational needs of the particular handicapped children. If the financially strapped parents cannot pay these expert witness fees and other up-front legal expenses, and they usually cannot, it is unlikely that the expenses would be covered by counsel themselves, at least not without a very strong case coupled with the potential of recovering expenses and costs in addition to or as part of an award of attorneys fees.

Finally, special education law has come to be viewed as a quite specialized area of the law. Given that it is complex and that it is unfortunately complicated, many attorneys appear to be unwilling to master special education law to the extent necessary to confront well-versed and experienced (and paid) legal adversaries. Without the incentive of fee awards, there is little hope of attracting competent private attorneys to represent handicapped children and their families.

In sum, there is a dire need for fee awards to attract private lawyers to represent handicapped children in special education actions and proceedings.

4. The Effect of Smith v. Robinson Is the Denial to Handicapped Children and Their Families of the Legal Representation Necessary to Assert Their Rights

In view of my experience as a civil rights lawyer and as an expert on fees law, I certainly am of the opinion that the Supreme Court's decision in Smith v. Robinson has already had an overwhelming "chilling effect" on the availability of private attorneys to represent handicapped children and their families. Moreover, Smith v. Robinson will continue to have this negative impact until Congress fully overrules that decision.

On behalf of the American Civil Liberties Union, I again urge the enactment of the Handicapped Children's Protection Act of 1985, as drafted in S. 415.

Senator WEICKER. Thank you all for your testimony, and the committee stands adjourned.

[The subcommittee adjourned at 11:30 a.m.]